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**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

JENNY LISETTE FLORES; *et al.*,

Plaintiffs,

v.

WILLIAM P. BARR, Attorney
General of the United States; *et al.*,

Defendants.

)
) Case No. CV 85-4544-DMG

)
) **DEFENDANTS' NOTICE OF**
) **TERMINATION OF *FLORES***
) **SETTLEMENT AGREEMENT; AND**
) **MOTION IN THE ALTERNATIVE**
) **TO TERMINATE THE FLORES**
) **SETTLEMENT AGREEMENT**

NOTICE OF MOTION

NOTICE IS HEREBY GIVEN that the U.S. Department of Justice, the U.S. Department of Homeland Security (DHS) and the U.S. Department of Health and Human Services (HHS), by and through undersigned counsel, will bring this motion for hearing on September 27, 2019 or as soon thereafter as counsel may be heard, before United States District Judge Dolly M. Gee, in Courtroom 8C, 8th Floor, at the Los Angeles – 1st Street courthouse located within the Central District of California.

COMPLIANCE WITH LOCAL RULE 7-3

This motion is made following telephonic meetings of counsel pursuant to L.R. 7-3, and paragraph 37 of the *Flores* Settlement Agreement (“Agreement”), which took place on August 22, 2019.

NOTICE OF TERMINATION OF SETTLEMENT AGREEMENT

As set forth below, Defendants hereby give notice that the Agreement is terminated by its own terms as of October 7, 2019, which is forty-five days following the publication of final rules implementing the Agreement. Agreement ¶ 40. The Agreement is also terminated under the terms of the Homeland Security Act, 6 U.S.C. §§ 279(f)(2), 552(a)(1).

MOTION TO TERMINATE SETTLEMENT AGREEMENT

In the alternative, if the Court determines that the Agreement does not terminate by its terms, DHS and HHS hereby move to terminate the Agreement under Federal Rules of Civil Procedure 60(b)(5) and (6). In light of the publication of regulations implementing the Agreement and the significant changes in circumstances since the Agreement was signed, the continuation of the Agreement is no longer possible, equitable, or in the public interest.

These motions are based upon the above Notice, the accompanying Memorandum of Points and Authorities, all pleadings and papers on file in this

1 action, and such other matters as may be presented to the Court at the time of the
2 hearing.

3 Dated: August 30, 2019

Respectfully submitted,

4
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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
NOTICE OF TERMINATION OF SETTLEMENT AGREEMENT;
MOTION TO TERMINATE SETTLEMENT AGREEMENT; AND
MOTION TO DECERTIFY CLASS**

I. INTRODUCTION

A. The federal rules that were published on August 23, 2019 represent the culmination of more than 30 years of effort and experience in developing and implementing standards relating to the custody of children who are subject to the immigration laws of the United States. These standards are designed to ensure due process for minors who are subject to immigration custody – the claim that formed the basis of this litigation – by providing standards of custody that are appropriate to the needs of children, enabling prompt unification of children with family members when children are apprehended alone, and creating regulatory standards for family residential centers (FRC) to allow children to remain with their parents in a protective environment when family units are apprehended together. In sum, the final rule “sets out nationwide policy for the detention, release, and treatment of minors” to ensure that minors in the custody of HHS or DHS are treated “with dignity, respect and special concern for their particular vulnerability” as minors. Agreement ¶¶ 9, 11; 45 C.F.R. § 410.102(d); *see* 84 Fed. Reg. 44,392, 44,525, 44,531 (Aug. 23, 2019); 8 C.F.R. § 236.3(a)(1).

The new rules implement this basic purpose of the Flores Settlement Agreement and, by the terms of that Agreement, replace what was designed to be a temporary measure. When the new rules go into effect on October 22, 2019, they will be the governing law for the treatment of children in immigration custody. Most of the provisions of the new rules do not differ from the Flores Settlement Agreement—including, for example, the substantive provisions governing HHS custody of unaccompanied alien children as well as the provisions governing temporary U.S. Customs and Border Protection (“CBP”) custody at the border. Indeed, in Plaintiffs’ motion to enforce filed last year, beyond the provisions

1 governing families in custody together, they identified few if any substantive
2 provisions of the proposed regulations with which they disagreed. *See* Mot. to
3 Enforce at 12–16.

4 With respect to children accompanied by their parents or legal guardians—a
5 situation entirely overlooked in the Agreement—the rules account for the greatly
6 increased prevalence of families traveling to the border—and the key issues arising
7 from that situation, including ensuring parents or legal guardians traveling with his
8 or her children do not evade enforcement of the immigration laws and can remain
9 with their children during immigration proceedings in a safe and appropriate
10 custodial setting. The rule thus addresses the unique issues that are raised when
11 releasing a minor in these circumstances. Where there are new provisions, changes
12 from, or elaboration on provisions of the Agreement—like the provisions addressing
13 family units—they are properly explained under the standards provided by the
14 Administrative Procedure Act (APA) and serve the basic purpose of the Agreement
15 to “set[] out nationwide policy for the detention, release, and treatment of minors”
16 and to treat minors “with dignity, respect, and special concern for their particular
17 vulnerability.” All these provisions therefore properly implement the Agreement,
18 resulting in termination of the Agreement by its own terms.

19 The parties agreed the Agreement would terminate upon the conclusion of this
20 rulemaking process under the APA. The Agreement was intended only as a
21 temporary measure until rules could be promulgated, and as the Ninth Circuit
22 recently explained, the Agreement “would remain in effect until ‘45 days following
23 defendants’ publication of final regulations’ governing the treatment of detained
24 minors.” *Flores v. Sessions*, 862 F.3d 863, 869 (9th Cir. 2017). It was obvious at
25 the time, as it is today, that the final rules would not and could not simply parrot the
26 terms of the Agreement—instead, they would implement the Agreement’s
27 fundamental goal of setting out a policy for the detention, release, and treatment of
28 minors that treats minors with special concern, while taking into account the

1 experience of the agencies in administering the Agreement, current operational
2 circumstances, intervening law, and comment from the public.

3 By specifying that the Agreement would terminate upon the “publication of
4 final regulations,” the parties implicitly acknowledged that such termination would
5 occur based on rules that differed from the Agreement in light of such
6 considerations. This was class counsels’ stated understanding at the time of
7 stipulation and has remained so to this day—in 2003, class counsel stated that final
8 rules must be “based on [the agency’s] own experience,” and in 2018, class counsel
9 explained that some provisions were “out of date and must be revised to reflect
10 operational realities.” Class Counsel Comments at 14 (2018); Flores Class Counsel
11 ORR Working Paper (Jan. 14, 2003). In fact, a settlement that provided for the
12 issuance of rules without regard to considerations required under the APA would
13 violate the APA and impermissibly bind federal action in perpetuity. Following the
14 regulatory process that the parties agreed to, the government has now published rules
15 that effectuate the central purpose of the Agreement: they “set[] out nationwide
16 policy for the detention, release, and treatment of minors,” and ensure minors are
17 treated “with dignity, respect, and special concern for their particular vulnerability
18 as minors.” Agreement ¶¶ 9, 11. Publication of the regulation thus terminates what
19 was designed to be a temporary measure until the rules could be issued.

20 **B.** It is a testament to the Agreement that after more than 20 years and a notice
21 and comment process, the final regulation does not differ from the standards of the
22 Agreement. As mentioned, other than the family residential center provisions,
23 Plaintiffs identified very few substantive provisions of the proposed rule raising
24 concerns in their Motion to Enforce filed last year. The substantive provisions
25 governing the treatment of unaccompanied alien children (UAC) by HHS and DHS
26 are taken verbatim from the Agreement—including, for example, the standard of
27 care in facilities, the requirements for licensed programs, and the requirement of
28 prompt transfer to licensed programs and release to a parent or other caregiver. The

1 primary change with respect to custody of UACs is procedural—namely, a hearing
2 procedure for determining whether an unaccompanied minor presents a risk of
3 danger to the community or a risk of flight that is under the auspices of HHS rather
4 than the Department of Justice. But that procedure includes the same regulatory
5 protections of an immigration bond hearing while reflecting Congress’s assignment
6 to HHS of the custodial role over UACs. The standards of care and transfer
7 requirements for all minors—both unaccompanied and accompanied—in DHS
8 custody—including by CBP and U.S. Immigration and Customs Enforcement
9 (ICE)—also parallel those in the Agreement without substantial change. The rule
10 also incorporates relevant provisions of the William Wilberforce Trafficking
11 Victims Protection Reauthorization Act of 2008 (TVPRA), which was enacted
12 subsequent to the implementation of the Agreement.

13 The only significant additions to or differences from the provisions of the
14 Agreement arise with respect to custody of family units—minors who are
15 apprehended and held in custody with a parent or legal guardian. As the Ninth
16 Circuit has explained, the complex issues that arise in this circumstance were not
17 contemplated or addressed by the parties in drafting the Agreement. *Flores v. Lynch*,
18 828 F.3d 898, 906–07 (9th Cir. 2016). Yet the number of family members arriving
19 together at the border has exploded—from a rare event in 1997; to under 15,000 in
20 2013; to around 400,000 so far this fiscal year.

21 Recognizing the significant interests at stake when a family unit is subject to
22 immigration enforcement, the rule addresses this regulatory void and accounts for
23 the interests at stake in these circumstances. First, the rule accounts for the needs of
24 the child by creating a custodial regime at non-secure family facilities that provides
25 all the protections set out in the Agreement and a licensing system that allows for
26 licensing by a state or, if unavailable, by the federal government with independent
27 third-party auditing. Second, the rule accounts for the needs of families by reducing
28 barriers to family custody during the pendency of immigration proceedings. Third,

1 the rule accounts for the important immigration enforcement interests of the United
2 States by providing a regime where—if detention is authorized or required by statute
3 and needed to avoid significant loopholes in the enforcement regime at the border—
4 the family can remain together under conditions that are sensitive to the interests of
5 the minor. Fourth, the rules provide appropriate avenues for prompt release of
6 minors: either through process that look at flight risk and danger through bond or a
7 revised parole regulation that parallels the standard of the Flores Settlement
8 Agreement, or by permitting DHS to consider release of the minor to an alternate
9 caregiver, when appropriate. Thus, the rule reasonably addresses a significant gap
10 in the Agreement concerning accompanied children in a manner consistent with the
11 goals of the Agreement and informed by present circumstances.

12 Because the final rule is consistent with the relevant terms of the Agreement,
13 complies with law enacted subsequent to its execution, reflects the latest conditions
14 relating to alien children in the United States, and properly addresses comments and
15 current circumstances in accordance with the APA, the Court should deny Plaintiffs’
16 motion to enforce and confirm that the Agreement has terminated by its own terms.

17 **II. BACKGROUND**

18 **A. The Original *Flores* Litigation**

19 This case began on July 11, 1985. Compl., ECF No. 1. Plaintiffs brought
20 their action on behalf of a class, later certified by the court, consisting of all aliens
21 under the age of 18 who are detained by the INS Western Region because “a parent
22 or legal guardian fails to personally appear to take custody of them.” *Reno v. Flores*,
23 507 U.S. 292, 296 (1993). Plaintiffs brought seven claims (*id.*) challenging legacy
24 INS’s “policies, practices, and regulations regarding the detention and release of
25 unaccompanied [alien] minors.” Agreement at 1. The first two claims challenged—
26 on constitutional, statutory, and international-law grounds—the INS Western
27 Region policy concerning the detention and release of minor aliens; the remaining
28 five claims challenged conditions of detention. *See Flores*, 507 U.S. at 296–97. The

1 parties entered into a settlement of on the detention conditions claims, and INS
2 published a rule on May 17, 1988, governing the release of alien juveniles. *See* 53
3 Fed. Reg. 17449. Plaintiffs challenged that rule, and the district court invalidated it
4 in part on substantive due process grounds, and the Ninth Circuit affirmed. *See*
5 *Flores v. Meese*, 942 F.2d 1352, 1365 (9th Cir. 1991).

6 The Supreme Court then reversed the Ninth Circuit. *Flores*, 507 U.S. at 315.
7 The Supreme Court rejected Plaintiffs’ substantive-due-process claim, noting that
8 “‘juveniles, unlike adults, are always in some form of custody,’” “and where the
9 custody of the parent or legal guardian fails, the government may . . . either exercise
10 custody itself or appoint someone else to do so.” 507 U.S. at 302 (quoting *Schall v.*
11 *Martin*, 467 U.S. 253, 265 (1984)). The Supreme Court held that where a child has
12 come within the Federal Government’s control, “[m]inimum standards must be met,
13 and the child’s fundamental rights must not be impaired; but the decision to go
14 beyond those requirements . . . is a policy judgment rather than a constitutional
15 imperative.” *Id.* at 304–05. The Supreme Court concluded that “[w]here a juvenile
16 has no available parent, close relative, or legal guardian, where the government does
17 not intend to punish the child, and where the conditions of governmental custody are
18 decent and humane, such custody surely does not violate the Constitution.” *Id.* at
19 303. Consequently, the Supreme Court determined the new rule was a “reasonable
20 response to the difficult problems presented when the Service arrests unaccompanied
21 alien juveniles” and held, on its face, “INS regulation 242.24 accords with both the
22 Constitution and the relevant statute.” *Id.* at 315.

23 **B. The *Flores* Settlement Agreement**

24 On remand, the parties entered into a settlement agreement to resolve the case.
25 The Agreement was subjected to a highly streamlined approval process, which did
26 not include a fairness hearing. Instead, it involved the posting of notices at a variety
27 of facilities that instructed children “who object [to] . . . file a statement setting out
28 their objections with the federal court” within 30 days. Class Notice at 1. Other

1 than providing the court's address, the notice provided the minors no other
2 information regarding how objections might be developed or submitted. *Id.* There
3 was also no procedure to evaluate the propriety of the settlement class that was
4 certified in the settlement – comprising “all minors who are detained in the legal
5 custody of the INS.” *Id.* The Agreement defined “minor” as “any person under the
6 age of eighteen (18) years who is detained in the legal custody of the INS,” other
7 than emancipated minors or minors incarcerated due to a criminal conviction as an
8 adult. Agreement ¶ 4. The district court approved this procedure on January 28,
9 1997, and the Agreement apparently became operative thirty days later, given that
10 no objections were filed within the allotted period. *See id.* ¶ 9.

11 The stated purpose of the Agreement was to establish a “nationwide policy
12 for the detention, release, and treatment of minors in the custody of the INS.”
13 Agreement ¶ 9. The Agreement addresses the custody of minors at all stages,
14 starting with custody immediately following apprehension. *Id.* ¶ 12. Specifically,
15 Paragraph 12 of the Agreement provides that minors will be expeditiously processed
16 and provided a notice of rights, including the right to a bond redetermination hearing
17 if applicable. *Id.* Following arrest, the INS shall hold minors in facilities that are
18 “safe and sanitary and that are consistent with the INS's concern for the particular
19 vulnerability of minors.” *Id.* The Agreement states the INS will promptly transfer
20 minors either under set timelines or, in the case of an influx, “as expeditiously as
21 possible.” *Id.* ¶ 12.A.3. “Influx” is defined as “those circumstances where the INS
22 has, at any given time, more than 130 minors eligible for placement in a licensed
23 program.” *Id.* ¶ 12.B, Ex. 3.

24 The Agreement further addresses the procedures and practices governing the
25 former INS's discretionary decisions to release or detain unaccompanied minors,
26 and to whom they may be released. *See* Agreement ¶¶ 14–18 (describing the general
27 framework for release of unaccompanied minors and announcing a “general policy
28 favoring release”). Concerning minors who remain in the custody of the INS, the

1 Agreement requires (with certain exceptions) placement in a licensed program and
2 provides guidelines for the conditions that must exist in such licensed programs. *Id.*
3 ¶¶ 19–24, Ex. 1. Nowhere does the Agreement specify criteria for programs or
4 conditions governing custody of family units.

5 The Agreement affords that “the court shall retain jurisdiction over this
6 action.” Agreement ¶ 35. The Agreement, however, was originally set to expire at
7 the latest, within five years, and even earlier upon a determination by the Court that
8 the INS was in substantial compliance. *Id.* ¶ 40. On December 7, 2001, the parties
9 amended paragraph 40 to provide for a termination date of “45 days following
10 defendants’ publication of final regulations implementing this Agreement.”
11 Stipulation, Dec. 7, 2001, ECF No. 101.

12 **C. Relevant *Flores* Litigation History**

13 Since the Agreement took effect, there has been significant litigation over its
14 terms and requirements. Most of that litigation has arisen from Plaintiffs’ motions
15 to enforce the Agreement.

16 Some litigation has focused on how to handle a rising influx of minors
17 apprehended with their parents. On July 24, 2015, this Court ruled, among other
18 things, that the Agreement applies to alien minors accompanied by their parents or
19 legal guardians and that housing family units in what was referred to as “secure” and
20 non-licensed family residential centers (FRCs) violated the Agreement. *Flores v.*
21 *Johnson*, 212 F. Supp. 3d 864 (C.D. Cal. 2015). In an August 2015 remedial order,
22 this Court acknowledged a migration “surge” constitutes an “influx” under the
23 Agreement, because the government had “more than 130 minors eligible for
24 placement in a licensed program.” *Id.* at 914. Accordingly, the Court found DHS’
25 practice of temporarily holding accompanied minors in its family residential centers,
26 even if those facilities were not “licensed” and “non-secure,” was within the
27 parameters of paragraph 12(A) of the Agreement. *Id.* at 914.

1 On appeal, the Ninth Circuit affirmed this Court's holding that the Agreement
2 applies to accompanied minors but reversed the district court's determination that
3 the Agreement required the release of accompanying parents. *Flores v. Lynch*, 828
4 F.3d 898, 907-09 (9th Cir. 2016). In holding that the Agreement created no
5 affirmative rights for parents, the Ninth Circuit noted that parents were not plaintiffs
6 in the *Flores* action, nor are they members of the certified classes. *Id.* at 909.

7 Recently, the Ninth Circuit reviewed the June 27, 2017, decision of this Court
8 granting Plaintiffs' motion to enforce concerning violation of the Agreement
9 regarding detention conditions at Border Patrol stations in the Rio Grande Valley
10 Sector, and the detention of minors in secure, unlicensed facilities. *Flores v. Barr*,
11 No. 17-56297, 2019 WL 3820265, at *3 (9th Cir. Aug. 15, 2019). The Ninth Circuit
12 dismissed the appeal for lack of jurisdiction, leaving in place this Court's order.

13 A Monitor has been appointed to monitor Defendants' compliance with this
14 Court's orders. The Monitor has reviewed conditions at various facilities and been
15 referred various issues in dispute between the parties. Notably, the recent Monitor's
16 report, filed August 19, 2019, acknowledged that the significant increase in the
17 number of UACs and family units crossing the border and presenting themselves to
18 CBP over the last year "is well known and has been dramatic." ECF No. 625-1 at 7,
19 *see id.* at 1.

20 The Homeland Security Act of 2002 (HSA) and TVPRA also prompted this
21 Court's involvement. In a decision affirmed by the Ninth Circuit in *Flores v.*
22 *Sessions*, 862 F.3d 863, 870 (9th Cir. 2017), this Court held that the statutes
23 superseded portions of the Agreement, in that only HHS could determine the
24 suitability of a UAC's sponsor. Nevertheless, this Court reasoned that if Congress
25 had intended to terminate the Agreement in whole or in part through passage of the
26 HSA or TVPRA, it would have said so specifically. This Court, also, found that
27 UACs in HHS custody had a right to a bond hearing before an immigration judge to
28 challenge any findings of flight risk or dangerousness. *Id.* at 875, 880–81. In

1 affirming this Court’s decision, however, the Ninth Circuit acknowledged that
2 determinations made at these bond hearings could not compel a child’s release,
3 because “a minor may not be released unless the agency charged with his or her care
4 identifies a safe and appropriate placement.” *Id.* at 868.

5 **D. Procedural History of the Present Filing**

6 On September 7, 2018, DHS and HHS issued a notice of proposed
7 rulemaking, *Apprehension, Processing, Care, and Custody of Alien Minors and*
8 *Unaccompanied Alien Children*, to implement the Agreement. *See* 83 Fed. Reg.
9 45,486 (Sept. 7, 2018). The proposed rule resulted in the submission of over 100,000
10 comments to the relevant agencies. *See* [https://www.regulations.gov/](https://www.regulations.gov/document?D=ICEB-2018-0002-0001)
11 [document?D=ICEB-2018-0002-0001](https://www.regulations.gov/document?D=ICEB-2018-0002-0001).

12 During the comment period, on November 2, 2018, Plaintiffs filed a motion
13 to enforce, asking this Court to enjoin the government from implementing final
14 regulations. ECF No. 516. On November 21, 2018, the Court deferred ruling on
15 Plaintiffs’ motion until publication of a final rule. ECF No. 525. The Court directed
16 that upon issuing the final rule, Defendants shall “forthwith file a notice to that
17 effect” and the parties shall file simultaneous supplemental briefing addressing
18 whether the rule is consistent with the terms of the Agreement. *Id.*

19 **E. Issuance of Regulations**

20 On August 23, 2019, DHS and HHS published the final rule implementing the
21 Agreement. *See* 84 Fed. Reg. 44,392 (Aug. 23, 2019). The key provisions of the
22 final rule address the comprehensive and multi-faceted obligations and
23 responsibilities that arise with respect to immigration custody and release of children
24 at multiple federal agencies, consistent with governing law; the current
25 circumstances on the ground; and, the main substantive provisions of the Agreement.
26 Specifically, the rule includes provisions that parallel the Agreement’s bedrock
27 protections regarding placement and release following apprehension of UACs.
28 These principles are also embodied in provisions addressing the custody of minors

1 apprehended with parents or legal guardians (*i.e.*, accompanied minors or non-
2 UACs)—a topic not addressed by the Agreement. The stated purpose of the
3 Agreement was to establish a “nationwide policy for the detention, release, and
4 treatment of minors in the custody of the INS.” Agreement ¶ 9. The regulation does
5 exactly that, in a reasonable manner informed by changes in law and facts that have
6 occurred since 1997.

7 As a threshold matter, the rule adopts the Agreement’s commitment to treat
8 all children in government custody with dignity, respect, and special concern for
9 their particular vulnerability as minors. Agreement ¶ 11; *see* 84 Fed. Reg. 44,392,
10 44,525, 44,531 (Aug. 23, 2019). 45 C.F.R. § 410.102; 8 C.F.R. § 236.3(a)(1). To
11 that end, the rule requires each detained minor be placed in the least restrictive
12 setting appropriate for their age and special needs. Agreement ¶ 11; 45 C.F.R. §
13 410.102; 8 C.F.R. § 236.3(g)(2), (i); *see* 84 Fed. Reg. at 44,527. The rule further
14 addresses the custody of all minors immediately following apprehension by
15 mandating, consistent with the Agreement, that minors receive notice of rights and
16 are placed in facilities that are safe and sanitary and which provide access to toilets
17 and sinks, drinking water and food, medical assistance for emergencies, adequate
18 temperature control and ventilation, and adequate supervision to protect minors from
19 others. *Compare* 8 C.F.R. § 236.3(g)(2) *with* Agreement ¶ 12.A; *see also* 45 C.F.R.
20 § 410.102(d).

21 The rule fundamentally parallels the Agreement’s procedures and practices
22 governing decisions to release or detain minors, and to whom they should or may be
23 released. *See* Agreement ¶¶ 14–18 (describing the general framework for release of
24 unaccompanied minors from INS custody and the procedures and priorities for
25 release). For unaccompanied minors, release is governed by the relevant provisions
26 of the TVRPRA, which is incorporated into the rule. *See* 45 C.F.R. § 410.301. For
27 accompanied minors, the rule implements this portion of the Agreement by adopting
28 the general release provision in paragraph 14, provided that any decision to release

1 must follow a determination that such release is permitted by law, including a revised
2 parole standard that parallels the paragraph 14 standard. *Compare* 8 C.F.R. §
3 236.3(j), *with* Agreement ¶ 14. The revised parole standard—in response to
4 comments including from Plaintiffs—makes plain that, for those accompanied
5 minors in expedited removal who have established a credible fear (as well as arriving
6 alien minors placed into proceedings under section 240 of the Immigration and
7 Nationality Act (INA)), parole will generally serve an urgent humanitarian reason
8 warranting release on parole if DHS determines that detention is not required to
9 secure the minor’s timely appearance before DHS or the immigration court, or to
10 ensure the minor’s safety and well-being or the safety of others. This standard
11 mirrors that in, and is derived from, Paragraph 14. *See* 8 C.F.R. § 236.3(j)(4). The
12 regulation also permits release of accompanied minors, in DHS discretion, to adult
13 relatives other than parents, including siblings, aunts, uncles, or grandparents. *See*
14 8 C.F.R. §§ 212.5(b)(3)(i) and 236.3(j). Likewise, the rule embraces the
15 Agreement’s terms requiring the government to make and record its prompt and
16 continuous efforts toward family reunification and release of minors. *Compare* 8
17 C.F.R. § 236.3(j)(1) *and* 45 C.F.R. 410.201(f) *with* Agreement ¶ 18. Thus, the rule
18 implements the Agreement’s procedures governing decisions to release or detain
19 minors.

20 The rule similarly parallels salient portions of the in specifying what to do
21 when an accompanied minor remains in DHS custody. *See* Agreement ¶¶ 19, 21–
22 24.A; 8 C.F.R. § 236.3(i)(4)(i–xv). This includes standards with which licensed
23 facilities where such minors are held must comply that are directly incorporated from
24 Exhibit 1 to the Agreement. *Compare* 8 U.S.C. § 236.3(i)(4)(i–xv) *with* Agreement
25 Exhibit 1. Specifically, under the rule, licensed facilities must meet a minimum of
26 15 categories of needs, including: (i) proper physical care and maintenance,
27 including suitable living accommodations, food and snacks, appropriate clothing,
28 and personal grooming items; (ii) appropriate routine medical and dental care, family

1 planning services, and emergency health care services (including screening for
2 infectious disease), within 48 hours of admission; and (iii) an individualized needs
3 assessment including a family history and mental health assessment. *Id.* §
4 236.3(i)(4)(i–iii). Further, compared with Exhibit 1 of the Agreement, the regulation
5 contains a slightly broadened educational services description and adds that program
6 design should be appropriate for length of stay. *Id.* § 236.3(i)(4)(iv). Sensibly, these
7 standards do not include “family reunification services,” since accompanied minors
8 are already with their parent or legal guardian. *See id.* § 236.3(i)(4)(iii)(H). Instead,
9 the regulation more suitably provides for communication with adult relatives in the
10 United States and internationally. *Id.* Finally, as in the Agreement, the rule provides
11 for the least restrictive placement of minors available and appropriate. *Compare* 8
12 C.F.R. § 236.3(g)(2), (i)(2) *with* Agreement ¶ 23.

13 The rule also implements provisions of the Agreement requiring that minors
14 in removal proceedings be provided with bond redetermination hearings in
15 accordance with applicable federal law. *Compare* 8 C.F.R. § 236.3(m) *with*
16 Agreement ¶ 24.A; *see also* 45 C.F.R. § 410.810. Specifically, the regulation at
17 section 236.3(m) provides review of DHS bond determinations by immigration
18 judges to the extent permitted by 8 C.F.R. § 1003.19, for minors who are: (1) in
19 removal proceedings under INA § 240, 8 U.S.C. § 1229a; and (2) in DHS custody.
20 Pursuant to INA Section 235, 8 U.S.C. § 1225, however, bond is not provided to
21 accompanied minors who are subject to expedited removal procedures. *See id.*
22 Instead, as we have explained, the parole standard is revised to parallel Paragraph
23 14 of the Agreement. 8 C.F.R. § 236.3(j). Like the bond hearing provisions, the
24 HHS regulations at 45 C.F.R. § 410.810 provide for hearings where unaccompanied
25 minors may make bond-like challenges to HHS custody, while also recognizing the
26 HHS assumption of all custody of unaccompanied minors after Congress enacted
27 the TVPRA.
28

III. ARGUMENT

A. The Agreement Terminates After the Promulgation of Regulations Governing the Treatment of Detained Minors

The parties unequivocally contracted that the Agreement would terminate upon issuance of implementing regulations using an APA rulemaking process. Agreement ¶ 40; Stipulation (Dec. 12, 2001), ECF No. 13 (providing a termination date of “45 days following defendants’ publication of final regulations implementing this Agreement.”). The parties acted against the backdrop of APA rulemaking standards, and thus did not specify any process for evaluation of those implementing regulations even though both Plaintiffs and Defendants agreed the regulations should not and would not replicate the terms of the Agreement in every respect. Indeed, the proposed rule issued in 1998—63 Fed. Reg. 39,759—was far less protective than the new Rule, yet the parties understood that proposal to be implementing the Agreement and to be subject notice and comment procedures. The most appropriate way to apply the termination provision is to consider the Agreement terminated upon the issuance of regulations that, as the Ninth Circuit explained, “govern the treatment of detained minors.” *Flores v. Sessions*, 862 F.3d 863, 869 (9th Cir. 2017). This is because the Agreement “was intended as a temporary measure” and “the parties stipulated that it would remain in effect” only until the promulgation of those regulations “governing the treatment of detained minors.” *Id.*

Accordingly, so long as those regulations implement the central purposes of the Agreement—to “set[] out a nationwide policy for the detention, release, and treatment of minors” that treats minors in custody “with dignity, respect, and special concern for their particular vulnerability,” Agreement ¶¶ 9, 11,—the Agreement terminates. The new regulations may then be subject to judicial review to the extent otherwise provided for by the INA and the APA by affected minors who would be subject to the new rules. To the extent this Court conducts a substantive review of the new regulations in this proceeding, they should be reviewed under the standard

1 of review in the APA, which Plaintiffs necessarily agreed to in agreeing to terminate
2 the Agreement upon conclusion of an APA rulemaking process. Any other standard
3 would violate the APA, create additional procedures for rulemaking in violation of
4 *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,
5 435 U.S. 519 (1978), and would provide no viable governing rule for decision.
6 Finally, to the extent the Court believes further litigation over specific issues
7 addressed by the Rule is warranted, it should agree the Agreement is terminated
8 except as to those specific issues.

9 **1. The Regulations Set Out A Nationwide Policy For The**
10 **Detention, Release, And Treatment Of Children And**
11 **Implement The Relevant and Substantive Terms Of The Flores**
12 **Settlement Agreement In Ensuring Minors Are Treated With**
13 **Dignity, Respect, And Special Concern For Their Particular**
14 **Vulnerability.**

15 The final rule implements the Agreement for purposes of its termination
16 provision. It is validation of the Agreement that after over 20 years and an extensive
17 notice and public comment process, those relevant and substantive terms of the
18 agreement are reflected, without substantial change, in parallel provisions of the
19 final rules.

20 With respect to unaccompanied alien children, the regulation provides
21 standards of care and custody that are identical to the standards set forth in the
22 Agreement, while incorporating the relevant substantive provisions of the TVPRA.
23 Specifically, the regulations contain provisions regarding transfer and release of
24 unaccompanied minors (including the more stringent transfer timeline from the
25 TVPRA) that are unchanged from the Agreement. The same is true for the standard
26 of care in facilities housing unaccompanied minors, the requirements for licensed
27 programs for unaccompanied minors, and the rules for promptly transferring those
28 minors to licensed programs and releasing them to a parent or other caregiver. The
only change with respect to custody over unaccompanied minors is procedural—

1 namely, a hearing procedure under the auspices of HHS rather than the Department
2 of Justice—and reflects Congress’s assignment to HHS of the custodial role over
3 unaccompanied minors.

4 The standards of care and transfer requirements for unaccompanied minors in
5 DHS custody—including by CBP and ICE—are also drawn from the Agreement
6 without substantial change.

7 With respect to accompanied minors in DHS custody, the regulations fill in
8 key gaps that were never addressed by the Agreement. The rule provides for the
9 licensing of facilities where family units can be held in custody together—filling a
10 key gap in the agreement that this Court and the Ninth Circuit have recognized. The
11 rule recognizes the interest in family unity for parents or legal guardians traveling
12 with their children that were not reflected in the original Agreement, but have been
13 recognized since that time as family migration numbers have exploded. And the rule
14 sets out circumstances under which family units or children in family units may be
15 released from custody through bond or parole in a manner that parallels Agreement
16 ¶ 14. It also provides authority under which children in family units may be released
17 to another relative identified by a parent and determined to be appropriate in the
18 discretion of DHS.

19 a. HHS Custody of Unaccompanied Minors

20 The provisions of the rule related to HHS and its custodial role with respect
21 to unaccompanied minors are substantively identical to the Agreement. They adhere
22 to the Agreement and statutory enactments establishing procedures for the
23 processing, care, custody, and release of UACs who by law are subject to the care
24 and custody of the Office of Refugee Resettlement (ORR). With respect to
25 placement into a licensed program, section 410.101 defines a “licensed program”
26 and requires that it meet the standards set forth in section 410.402. Both the
27 definition of “licensed program” and the standards that it must meet are fully
28

1 consistent with paragraph 6 and Exhibit 1 of the Agreement.¹ Section 410.202 states
2 that ORR places a UAC into a non-secure, licensed program promptly after a UAC
3 is transferred to ORR custody, except in certain enumerated circumstances. 45
4 C.F.R. § 410.202; *see also* 8 U.S.C. § 1232(c)(2)(A). The provision is fully
5 consistent with the Agreement. *See* Agreement ¶ 12. The exceptions to such
6 placements are also entirely consistent with the Agreement. *See* 45 C.F.R. §
7 410.202(c) (placing minors in licensed programs as expeditiously as possible during
8 influx); 45 C.F.R. § 410.202 (addressing placement in a secure facility pursuant to a
9 court decree or court-approved settlement).

10 Likewise, section 410.203 sets forth criteria for placing UACs in secure
11 facilities that are entirely consistent with the Agreement's criteria and, indeed, are
12 more protective than the Agreement given intervening changes in the law.² The
13 regulation does not include "escape risk" as a consideration for making a secure
14 placement, even though the Agreement allowed escape risk to be considered.
15 *Compare* 45 C.F.R. § 410.203 *with* Agreement ¶ 21. The change derives from the
16 TVPRA, which specifies that an unaccompanied child "shall not be placed in a
17 secure facility absent a determination that the child poses a danger to self or others
18 or has been charged with having committed a criminal offense." 8 U.S.C.
19 § 1232(c)(2)(A). The rule does not provide examples of behaviors or offenses that
20 may result in secure placement, in favor of a circumstance-specific review and
21 approval procedure, consistent with the Agreement. *Compare* 45 C.F.R.
22 § 410.203(a) *with* Agreement ¶ 21. A "Federal Field Specialist" reviews and

23 ¹ Paragraph 6 of the Flores Settlement Agreement, defining a "licensed program,"
24 also contains a requirement that reasonable efforts be made to provide licensed
25 placements in geographical areas where the majority of minors are apprehended.
26 This language is found in the final rule at 45 C.F.R. § 410.201(c).

27 ² A "secure facility" is "a State or county juvenile detention facility or a secure ORR
28 detention facility, or a facility with an ORR contract or cooperative agreement
having separate accommodations for minors." 45 C.F.R. § 410.100. A secure
facility does not need to meet the requirements of section 410.402. *Id.*

1 approves placements in secure facilities. 45 C.F.R. § 410.203(b). The Agreement
2 assigned this review and approval task to a “regional juvenile coordinator,”
3 Agreement ¶ 23, but this is a position that exists only at DHS (and that previously
4 existed within INS). An ORR “Federal Field Specialist” is functionally equivalent
5 to a “regional juvenile coordinator.” Additionally, and as an added protection,
6 consistent with the TVPRA, 8 U.S.C. § 1232(c)(2)(A), the rule provides that ORR
7 will review the placement of a UAC in a secure facility at least monthly to determine
8 whether a new level of care is more appropriate. 45 C.F.R. § 410.203(c).

9 Finally, pursuant to section 410.301, ORR releases a UAC to a sponsor
10 without unnecessary delay when ORR determines that continued custody is not
11 required either to secure the UAC’s timely appearance before DHS or the
12 immigration courts, or to ensure the UAC’s safety or the safety of others. This is
13 identical to paragraph 14 of the Agreement. Section 410.301 also contains the list
14 of individuals (and entities) to whom ORR releases a UAC. The list follows the
15 order of preference set out in the Agreement at paragraph 14.

16 Concerning what has been referred to as bond hearing procedures to consider
17 flight risk and danger, the rules provide the substantive protections of paragraph 24
18 of the Agreement, while recognizing that unaccompanied minors are no longer
19 charged any “bond” whatsoever in order to be released to a suitable sponsor,
20 unaccompanied minors may not be released on their own recognizance, and ORR
21 must determine a sponsor is suitable prior to release. *See* 6 U.S.C. § 279(b)(2),
22 (b)(4); 8 U.S.C. § 1232(c)(3)(A). The rules reasonably reallocate responsibility for
23 these hearings for minors in ORR care to HHS. 45 C.F.R. § 410.810. In the HSA
24 and TVPRA, Congress provided for HHS to be responsible for the custody and
25 placement of UACs. 6 U.S.C. § 279; 8 U.S.C. § 1232(b)(1), (c). The TVPRA
26 imposed detailed requirements governing ORR’s release of UACs to proposed
27 custodians—including a provision authorizing ORR to consider a UAC’s
28 dangerousness and risk of flight in making placement decisions. *Id.* § 1232(c)(2)(A).

1 Consistent with the TVPRA, bond determinations for UACs in ORR custody will be
2 made by an independent HHS hearing officer. 45 C.F.R. § 410.810(a). This process
3 parallels the process described in the Agreement because, under both the rule and
4 the Agreement, the individual who presides over the hearing resides within the same
5 agency as the organization charged with custody of the UAC. Thus, the rule
6 provides for the level of independence in the hearing process contemplated by the
7 Agreement. These rules address the concerns identified by the Ninth Circuit in
8 litigation over this issue. *See Flores*, 862 F.3d at 878 (noting that in contrast with
9 the recently published rule, the then-existing ORR procedures were “governed by a
10 manual” and did not include various procedural protections). Thus, provisions
11 related to HHS bond hearings fully adopt the Agreement and statutory enactments.

12 b. Initial DHS Custody of Accompanied and Unaccompanied
13 Minors.

14 The rule implements existing Flores Settlement Agreement provisions related
15 to DHS apprehension of minors—accompanied and unaccompanied—without
16 material change. CBP frequently is frequently responsible for custodial care of a
17 minor following apprehension and prior to transfer to ICE (if accompanied) or HHS
18 (if unaccompanied). ICE also is responsible for temporary care of an
19 unaccompanied minor apprehended in the interior. During this initial period, the
20 transfer timeframe of the Agreement for UACs has been accelerated due to the
21 intervening enactment of the TVPRA, requiring a transfer to HHS within 72 hours
22 of determining that the alien is a UAC, absent certain specified circumstances. 8
23 U.S.C. § 1232(a), (b). That requirement is incorporated into the new rules. *See* 8
24 C.F.R. § 236.3(f)(3). The rules regarding transportation and detention of minors
25 with unrelated adults also present no substantive change from the Agreement. *See*
26 8 C.F.R. § 236.3(f)(4)(i); 8 C.F.R. § 236.3(g)(2)(i).

27 With respect to the conditions of custody upon initial apprehension,
28 section 236.3(g)(2) parallels the requirements in paragraphs 11 and 12.A of the

1 Agreement. For instance, section (g)(2) continues to require that minors be held in
2 the least restrictive setting appropriate for their age and special needs, consistent
3 with applicable law. Additionally, section (g)(2), like the Agreement's provisions
4 governing initial custody, requires that minors be housed in facilities that are safe
5 and sanitary, and that the facilities provide access to toilets and sinks, drinking water
6 and food as appropriate, access to emergency medical assistance as needed, and
7 adequate temperature and ventilation. The preamble explains that CBP generally
8 provides basic hygiene items and clean bedding, and makes reasonable efforts to
9 provide showers to minors when they are approaching 48 hours in custody. 84 Fed.
10 Reg. at 44,430. Accordingly, the rule implements the substantive provisions related
11 to DHS under the Agreement verbatim.

12 Further, in order to provide ongoing oversight and monitoring of conditions
13 at CBP facilities, and in response to comments on the proposed rule, the final
14 regulation clarifies the proposed role of Juvenile Coordinators. *See* 84 Fed. Reg. at
15 44,409 (clarifying that the role of Juvenile Coordinator includes both “collect[ing]
16 statistics” and “monitor[ing] compliance with the terms of the regulations”). This
17 fully incorporates the role set out in Paragraph 28A of the Agreement. The formal
18 functions of the Juvenile Coordinators are set forth in section 236.3(o) of the final
19 regulation, requiring CBP and ICE each to identify a Juvenile Coordinator for the
20 purpose of monitoring statistics about UACs and minors who remain in DHS
21 custody for longer than 72 hours, and to monitor compliance with the terms of the
22 regulations. The statistical information collected pursuant to this provision may
23 include, but would not be limited to, biographical information, dates of custody,
24 placement, transfers, removals, or releases from custody. The Juvenile Coordinators
25 may collect such data, if appropriate, and may also review additional data points
26 should they deem it appropriate given operational changes and other considerations.
27 The Juvenile Coordinator will also “monitor compliance (including for instance,
28

1 conducting facility visits, reviewing agency policies and procedures, or interviewing
2 employees and/or detainees).” 84 Fed. Reg. at 44,450.³

3 c. Provisions Relating to Accompanied Minors

4 The custody and care of family units was not addressed by the parties in the
5 Flores Settlement Agreement, and is subject to new regulatory provisions
6 specifically designed to address those circumstances. As the Court knows, there has
7 been significant litigation over whether the Agreement applies to minors who are
8 accompanied by a parent or legal guardian when apprehended. The United States
9 maintains its position for purposes of these proceedings that the Agreement does not
10 apply to accompanied minors, and that the rule’s provisions relating to accompanied
11 minors are therefore not governed by the Agreement’s termination provision. In any
12 event, even if the Agreement applies to these minors, court decisions and years of
13 recent litigation have shown that the Agreement did not specifically, thoughtfully,
14 or comprehensively address the complex issues that arise when a child is
15 apprehended with a parent or legal guardian. The rule attempts to address these
16 circumstances in detail and, in doing so, fully comports with any possible review
17 standard this Court might employ.

18 As a threshold matter, the Agreement is of limited assistance in evaluating the
19 rule’s provisions related to detention of accompanied minors, *i.e.*, children who are
20 encountered with a parent or legal guardian. As noted by the Ninth Circuit, “the

21 ³ Currently, CBP’s Juvenile Coordinator conducts regular visits to CBP facilities to
22 monitor compliance with the Agreement and with CBP policy related to the
23 treatment of minors and UACs in CBP custody (including determining whether
24 facilities are safe and sanitary and whether minors and UACs have access to
25 adequate food and water). *See* 84 Fed. Reg. at 44,431. The Juvenile Coordinator
26 also conducts reviews of juvenile custodial records as part of this monitoring role.
27 *Id.* CBP also has juvenile coordinators in its field offices and sectors, who are
28 responsible for managing all policies on the processing of juveniles within CBP
facilities, coordinating within CBP and across DHS components to ensure the
expeditious placement and transport of juveniles placed into removal proceedings
by CBP, and informing CBP operational offices of any policy update. *Id.*

1 Settlement does not address the potentially complex issues involving the housing of
2 family units and the scope of parental rights for adults apprehended with their
3 children.” *Flores*, 828 F.3d at 906–07. For example, Exhibit 1 of the Agreement,
4 which sets forth requirements for licensed programs, “does not contain standards
5 related to the detention of adults or family units.” *Id.* at 906. Indeed, the Ninth
6 Circuit explained that the “parties gave inadequate attention to some potential
7 problems of accompanied minors,” and we have seen those problems play out in
8 litigation over the last several years. *Id.* (“[t]hough it is no defense that the Flores
9 Settlement is outdated, it is apparent that this agreement did not anticipate the current
10 emphasis on family detention”) (quoting *Bunikyte, ex rel. Bunikiene v. Chertoff*,
11 No. A-07-CA-164-SS, 2007 WL 1074070, at *3 (W.D. Tex. Apr. 9, 2007)). The
12 Agreement does not require the release of parents or legal guardians who are
13 apprehended with their children, *Flores*, 828 F.3d at 909, and requiring release in
14 those circumstances would create “incentive[s] for adults to bring juveniles on the
15 dangerous journey to the United States and then put them in further danger by
16 illegally crossing the United States border, in the expectation that coming as a family
17 will result in an immediate release into the United States.” 84 Fed. Reg. at 44,403.
18 Consequently, given the parties’ failure to specify provisions concerning detention
19 of *accompanied* minors and their parents, the rule addresses this gap in a manner
20 consistent with protections the Agreement provides for children, the interest in
21 family unity, and the need for enforcement of immigration laws, given the
22 operational realities of a family migration crisis that was not anticipated at the time
23 of the Agreement.

24 *i.* First, the rules adopt key provisions from the Agreement regarding the
25 conditions for facilities where accompanied children are held in custody. Such
26 facilities must satisfy all the requirements set forth in Exhibit 1 of the Agreement,
27 and they must be licensed by a State or, if such a licensing scheme is unavailable,
28

1 comply with a process designed to provide independent review and similarly ensure
2 compliance with the regulatory protections.

3 The rule at section 236.3(i)(4) adopts the Agreement's standards for the
4 conditions that must exist in licensed facilities where accompanied minors are held
5 in ICE custody. *See* Agreement, Exhibit 1. For example, the definition of "licensed
6 facility" in section 236.3(i)(4)(i–xv) generally includes the Agreement's provisions
7 regarding personal, medical, psychological, and educational needs, including
8 compliance "with all applicable state child welfare laws and regulations and all state
9 and local building, fire, health, and safety codes." Agreement, Ex. 1, (A). Under
10 the Agreement, such a facility must be non-"secure," and the regulations include that
11 same requirement for family residential centers. 8 C.F.R. § 236.3(i)(4). Compared
12 with Exhibit 1 of the Agreement, ICE's requirements also contain a slightly
13 broadened educational services description and add that program design should be
14 appropriate for length of stay. 8 C.F.R. § 236.3(i)(4)(iv). Additionally, section
15 236.3(i)(4)(iv) continues to endorse the provision of appropriate foreign language
16 reading materials for leisure time.

17 Further, section 236.3(i)(4)(vii) implements paragraph 6 of section A of
18 Exhibit 1 of the Agreement, requiring licensed facilities to provide minors with at
19 least one individual counseling session weekly. The rule modifies the Agreement
20 slightly by requiring either one individual counseling session or one "mental health
21 wellness interaction" per week, in acknowledgment of comments that a minor should
22 not be required to participate in counseling if he or she does not wish to. 8 C.F.R.
23 § 236.3(i)(4)(vii). Moreover, the rule maintains the Agreement's commitment to
24 provide minors with privacy during family visits, limited only by the need to
25 "reasonably prevent[] the unauthorized release of the minor." *Compare* Agreement,
26 Ex. 1(A)(11) *with* 8 C.F.R. § 236.3(i)(4)(xi) (permitting staff to "reasonably
27 prevent[] the unauthorized release of the minor and prevent[] the transfer of
28 contraband."). This caveat presents no concrete impediment to the minor's privacy,

1 while also taking into account ICE’s obligation to safeguard the minor’s welfare.
2 Compared with Exhibit 1 of the Agreement, these slight differences do not undercut
3 the Agreement’s central standards governing conditions of licensed programs. 8
4 C.F.R. § 236.3(i)(4)(xi).

5 With respect to licensing, the Agreement’s requirement that programs in
6 which minors may be detained during immigration proceedings be licensed “by an
7 appropriate State agency . . . for dependent children” must be adapted to the unique
8 circumstances presented by family units. *See* Agreement ¶ 6. Accompanied minors
9 are, by definition, not subject to a “State agency . . . for dependent children” under
10 the applicable provision of the Agreement, because they are with their parents. *See*
11 *id.* And while the State of Texas has been working on a licensing system for facilities
12 in that state housing families, most states have no licensing scheme for facilities to
13 hold minors who are together with their parents or legal guardians—such facilities
14 are unique to the immigration system—and the license in another state with a FRC,
15 Pennsylvania, has been the subject of litigation. *See* 84 Fed. Reg. at 44,419. A few
16 years ago, this Court concluded that at that time there were no facilities that could
17 comply with the *Flores*-required licensing conditions *and* authorize adults to be
18 housed in the same facility. *See* Order (June 27, 2017), ECF No. 363.

19 In response to this conundrum and gaps in the Agreement, the rule provides
20 an alternative licensing scheme for ICE family residential centers for accompanied
21 minors that is consistent with the substantive protections of the Agreement. Under
22 paragraph 6 of the Agreement, a “licensed program” must generally be “non-
23 secure,” except in certain cases for special needs minors. The regulations likewise
24 provide for family residential centers to be non-secure. 8 C.F.R. § 236.3(i)(3).
25 Section 236.3(b)(9) also includes a definition of “licensed facility” that requires
26 facilities to obtain licensing where appropriate licenses are available from a state,
27 county, or municipality in which the facility is located. Where such licensing is not
28 available, the rule creates an alternative oversight regime that requires DHS to

1 employ third parties to conduct audits of family detention centers to ensure
2 compliance with ICE’s family residential standards. 8 C.F.R. § 236.3(b)(9). The
3 rule also provides materially identical assurances about the conditions of facilities
4 and implements the overarching purpose of the Agreement’s licensing requirement,
5 allowing families to remain together during their immigration proceedings. *See* 8
6 C.F.R. § 236.3(i)(4)(i–xv). These protections are therefore fully consistent with the
7 overarching principles set out in the Agreement, but are specifically designed to
8 address the attendant circumstances that were not considered by the parties – and for
9 which the Agreement left a gap – relating to minors apprehended with their parents
10 or legal guardians.

11 *ii.* The rule also accounts for the interest of accompanying parents in family
12 unity that were not considered or addressed by the parties in negotiating the
13 Agreement. In June 2018, the President issued an executive order providing that it
14 is the “policy of this Administration to maintain family unity, including by detaining
15 alien families together where appropriate and consistent with law and available
16 resources.” Exe. Order No. 13841, § 1, *Affording Congress an Opportunity To*
17 *Address Family Separation*, 83 Fed. Reg. 29,435 (June 20, 2018). Shortly thereafter,
18 a district court in San Diego recognized a strong interest in family unity when parents
19 are apprehended with their children and paced in immigration proceedings
20 together—interests that were not represented, facilitated, addressed, or even
21 recognized by the Agreement. *See Ms. L. v. U.S Immigration & Customs Enf’t*, 310
22 F. Supp. 3d 1133, 1143–48 (S.D. Cal. 2018). This Court likewise recognized the
23 interest in family unity (and the fact that these issues were not addressed by the
24 Agreement) in acknowledging that in certain circumstances a parent would need to
25 waive the Agreement to remain together in family custody. *See Flores v. Sessions*,
26 No. CV 85-4544-DMG (AGRx), 2018 WL 4945000, at *3–5 (C.D. Cal. July 9,
27 2018). Commenters on the Flores rule also expressed significant concerns about
28 family separation. *See, e.g.*, 84 Fed. Reg. at 44,392, 44,429.

1 These judgments by the President, this Court, other courts, and commenters
2 recognize there are important issues to be addressed that were not faced by the
3 parties in the Agreement. Importantly, parents are not Plaintiffs in the *Flores* action
4 nor members of the certified class, and the Agreement provides “no affirmative
5 release rights for parents.” *Flores*, 828 F.3d at 909. Indeed, as noted by the Ninth
6 Circuit, the context of the Agreement was the product of litigation “in which
7 unaccompanied minors argued that release to adults other than their parents was
8 preferable to remaining in custody until their parents could come get them.” *Flores*,
9 828 F.3d at 909. Given the changes to the operational reality and these concerns
10 regarding family unity, the Agreement’s original release provisions, governing
11 minors detained apart from their parents, are not necessarily applicable or
12 appropriately tailored for the situation when a minor is encountered with a parent.

13 The rule addresses the interest in family unity in three ways. First, it sets out
14 a regulatory regime for family residential centers where families can remain in
15 custody together in non-secure, licensed facilities during the pendency of their
16 immigration proceedings, with conditions derived from the Agreement that replicate
17 those provided for UACs in ORR custody.

18 Second, the rule clarifies and amends parole standards in a manner that
19 parallels Paragraph 14 of the Agreement. Thus, for those minors in expedited
20 removal who establish a credible fear, parole will generally serve an urgent
21 humanitarian reason warranting release on parole “if DHS determines that detention
22 is not required to secure the minor’s timely appearance before DHS or the
23 immigration court, or to ensure the minor’s safety and well-being or the safety of
24 others.” Compare 8 C.F.R. § 236.3(j)(4) with Flores Settlement Agreement ¶ 14
25 (release required “[w]here the INS determines that the detention of the minor is not
26 required either to secure his or her timely appearance before the INS or the
27 immigration court, or to ensure the minor’s safety or that of others”).

1 Third, it provides authority for DHS to release accompanied minors to another
2 adult relative—including relatives identified by the parent in custody—who can
3 provide appropriate care and treatment for the minor. 8 C.F.R. §§ 212.5(b)(3)(i),
4 236.3(j)(5)(i).

5 Together, these provisions address the interest in family unity within the
6 larger context of immigration enforcement. As one court explained, when there is a
7 legitimate need to detain a parent, family integrity is not threatened, as the legitimate
8 goals of immigration detention can be met “by temporarily detaining families
9 together in family residential facilities.” *Jacinto-Castanon de Nolasco v. U.S.*
10 *Immigration & Customs Enf’t*, 319 F. Supp. 3d 491, 498 (D.D.C. 2018) (citing *Ms.*
11 *L.*, 302 F. Supp. 3d at 1159–60). There, parents may provide care to, or exercise
12 custody and control over, their children in a facility licensed under the standards set
13 forth in the rule.⁴

14 *iii.* The rule also accounts for the legitimate governmental interest in
15 immigration enforcement and the strong Congressional preference that those
16 arriving at the border—including parents with accompanying children—be detained
17 pending a determination of their entitlement to be admitted to the United States. 8
18 U.S.C. § 1225 (detention required for applicants for admission); *see* 8 U.S.C.
19 § 1232(a)(5)(D), (b)(1) (excluding from Section 1225 provisions *unaccompanied*
20 alien children). Although DHS may exercise its discretion to release accompanied
21 minors and their parents or legal guardians, *nothing* in the Agreement states the
22 government agreed to do so, and federal law generally provides for detention of
23 aliens arriving at the border. *See Flores*, 828 F. 3d at 908 (the Agreement does not
24

25 ⁴ As recognized by class counsel, “the migration experience ‘means the loss of the
26 familiar: home, language, belongings, cultural milieu, social networks and social
27 status—without the support of an intact family to buffer against those losses.’” *See*
28 *Class Counsel Comments* at 29 (Nov. 6, 2018) (citations omitted). This comment,
oriented towards the conditions faced by unaccompanied children, reflects the
importance of family unity that is made possible by the final rule.

1 require the release of parents). Nevertheless, the absence of licensing systems for
2 facilities that hold alien family units has effectively forced the government to treat
3 the Agreement as if it included a requirement for release of family units.

4 By better approximating the treatment of family units to the treatment of
5 adults, while ensuring family-appropriate handling if detention is required, the
6 Flores Rule addresses a substantial loophole. With that loophole in the law, there
7 has been an explosion of family migration patterns—where the number of people
8 traveling in family units has increased *over twenty-five times* the number in 2013,
9 from 14,855 that year to nearly 400,000 thus far this fiscal year (with three months
10 still remaining). 84 Fed. Reg. at 44,404; *see Flores*, 507 U.S. at 296 (observing that
11 around 2,500 children were apprehended with family in 1990).⁵ Adults who choose
12 to travel with children subject those children to a dangerous journey, a substantial
13 risk of injury or death, and in some cases, exposure to violent traffickers. *See* 84
14 Fed. Reg. at 44,403 (rule addresses “significant and ongoing surge of adults who
15 have made the choice to enter the United States illegally with juveniles or make the
16 dangerous overland journey to the border with juveniles, a practice that puts
17 juveniles at significant risk of harm”); McAleenan Statement (Aug. 21, 2019) (“the
18 new rule will protect children by reducing incentives for adults, including human
19 smugglers, to exploit minors in the dangerous journey to our border”). Reducing the
20 scope of that problem is an important and legitimate purpose behind this regulation.
21 The mandatory release of alien family units simply does not exist anywhere in the
22 Agreement, cannot be assumed, and is squarely in conflict with congressional
23 enactments. *Id.* To be sure, the rule clarifies parole standards that apply before
24 credible fear is established, making clear that traveling with a child will not generally
25 lead to a grant of parole *prior to* a credible fear determination, so as to ensure that

26 ⁵ The numbers through July 2019 are 474,787. [https://www.cbp.gov/newsroom/](https://www.cbp.gov/newsroom/stats/sw-border-migration)
27 [stats/sw-border-migration](https://www.cbp.gov/newsroom/stats/sw-border-migration). Family unit numbers represent the number of individuals
28 apprehended with a family member (either a child under 18 years old, parent, or
legal guardian). 84 Fed. Reg. at 44,404.

1 the standards for children match those of their parents with whom they are traveling.
2 84 Fed. Reg. at 44,393. This is consistent with practice under the Agreement, where
3 time has generally been provided to permit a prompt credible fear inquiry while
4 families are at family residential centers. *See* Order at 29–31 (June 27, 2017). The
5 regulation also states that if a credible fear of persecution is established, parole will
6 generally be warranted if DHS determines that the minor is not a or flight risk, or
7 that detention is required to ensure the minor’s safety or the safety of others, a
8 standard derived directly from Paragraph 14 of the Agreement. *See* 8 C.F.R.
9 § 236.3(j)(4); 84 Fed. Reg. at 44,529. The rule thus provides that the standards
10 governing release of minors are generally consistent with the standards governing
11 release of their accompanying parents. This consistency, combined with the
12 licensing regime, eliminates what is currently a significant incentive to travel with
13 children in order to avoid immigration enforcement rules that otherwise apply to
14 adults crossing the border. *See* 84 Fed. Reg. at 44,403.

15 In sum, by creating an alternative federal licensing scheme for non-secure
16 family residential centers and clarifying parole standards, the rule eliminates the
17 Agreement’s unanticipated barrier to family unity while preserving DHS’s ability to
18 serve its statutory function and eliminating an incentive to travel with children to
19 avoid immigration enforcement. Importantly, the rule establishes family custody
20 conditions and procedures, but it does not require detention. *See* Class Counsel
21 Comments at 39 (Nov. 6, 2018) (agreeing the rule “does not delineate the
22 circumstances in which [family] detention might be deemed appropriate”). Instead,
23 it clarifies parole standards so that individual officers can evaluate the need for
24 detention using standards that largely parallel those in the Flores Settlement
25 Agreement; it also allows release of an accompanied child to another adult relative
26 in appropriate circumstances. The final rule fills gaps not addressed in the
27 Agreement with respect to family units, so as to “set[] out nationwide policy for the
28 detention, release, and treatment of minors” in immigration custody and ensure those

1 minors traveling with parents are treated “with dignity, respect, and special concern
2 for their particular vulnerability as minors.” Agreement ¶¶ 9, 11. The rule therefore
3 implements the Agreement, while simultaneously addressing issues not considered
4 by the Agreement in a way that implements the Agreement’s overarching purposes.

5 **2. Plaintiffs’ Motion to Enforce Included Minimal Objections to the**
6 **Substantive Provisions of the Proposed Rule.**

7 Given simultaneous briefing, the government does not know what objections
8 Plaintiffs will raise with respect to the final rule. But we note that, beyond the
9 provisions addressing family units, and putting aside Plaintiffs’ rhetorical tone in
10 that pleading and effort to obtain contempt sanctions, Plaintiffs raised minimal
11 objections to the substance of the proposed rule in their Motion to Enforce filed in
12 November 2018. And the final rule addresses some of Plaintiffs’ primary objections
13 to provisions relating to family units.

14 With respect to family units, Plaintiffs’ primary complaint was that the
15 “Defendants propose to detain accompanied children indefinitely.” Mot. at 6. As
16 an initial matter, there is absolutely nothing in the rule that contemplates indefinite
17 detention of children. Rather, the rule sets forth procedures for the possible detention
18 of minors during their immigration processing, a process that has a definitive end.
19 Moreover, as explained above, the rules governing custody of minors accompanied
20 by their parents or legal guardians balance multiple interests in a reasonable way and
21 fill gaps the parties did not address in the Agreement. *Supra*, § 1.c. It is also
22 important to emphasize that the final rules responded to comments addressing this
23 issue in two important ways.

24 First, the rules authorize DHS to consider a request and release accompanied
25 minors to an adult relative other than a parent or legal guardian in the discretion of
26 DHS. 8 C.F.R. §§ 212.5(b)(3)(i). 236.3(b)(j)(5)(i); 84 Fed. Reg. at 44,411, 44,445
27 (based on comments, providing authority to release accompanied minors to other
28

1 non-detained adult relatives, including grandparents, aunts, uncles, brothers, or
2 sisters); *see* Mot. at 7 (urging a procedure to allow release to alternate caregivers).

3 Second, in response to comments, including those from Plaintiffs, the new
4 rule amends parole standards to provide that if a minor accompanied by his or her
5 parent or legal guardian establishes credible fear, “paroling such minors who do not
6 present a safety risk or risk of absconding will generally serve an urgent
7 humanitarian reason” and that DHS “may also consider the minor’s well-being.” 84
8 Fed. Reg. at 44,445; *see* 8 C.F.R. § 236.3(j)(4). As discussed above, this standard is
9 parallel to Paragraph 14 of the Agreement.

10 In their Motion to Enforce, Plaintiffs also objected to the licensing scheme for
11 family residential centers, Mot. at 8-11, but we have explained in detail how the final
12 rules appropriately addressed this situation, which was not addressed between the
13 parties in the Agreement, as this Court and the Ninth Circuit have explained.
14 Plaintiffs do not explain how their approach—which would essentially make family
15 custody impossible and require family release or family separation—is anything the
16 parties contemplated. Plaintiffs also asserted in the Motion to Enforce that family
17 residential centers are not in fact “non-secure” under the proposed regulatory
18 definition. Mot. at 11. The final regulations address this issue expressly and make
19 clear that non-secure is defined by state law, a standard that derives directly from
20 the Agreement. 8 C.F.R. § 236.3(b)(11); *see* 84 Fed. Reg. at 44,392, 44,423 (“DHS
21 accepts the commenter’s suggestion to add the language ‘under state law’ into the
22 definition of ‘non-secure’ in this final rule”); Agreement ¶ 6 (“facilities shall be non-
23 secure as required under state law”). The preamble also clarifies that family
24 residential centers are “non-secure and a family is not physically prevented from
25 leaving the facility.” 84 Fed. Reg. at 44,400; *see also* 84 Fed. Reg. at 44,443 (in
26 response to comments about egress, “DHS will be adding additional points of egress
27 to the Dilley and Karnes facilities by September 30, 2019”).

1 In their Motion to Enforce, Plaintiffs argued it was inappropriate for HHS to
2 place a minor in a secure facility when the minor might pose “a danger to self and
3 others.” Mot. at 12 (citing 45 C.F.R. § 410.203(a)(5)). They argued this standard is
4 too “vague” and does not properly implement Paragraph 11. *Id.* But the standard in
5 the final rule comes directly from the TVPRA, *see* 8 U.S.C. § 1232(c)(2)(A), 84 Fed.
6 Reg. at 44,455, is language common to the child welfare world, and parallels
7 language in paragraph 21 of the Agreement.⁶ Plaintiffs do not explain how HHS is
8 able to disregard the statutory mandate of the TVPRA. Indeed, the standard in
9 Paragraph 11 encompasses the same concern, yet in terms that are even more
10 “vague” than the TVPRA and the final regulation. *See* Agreement ¶ 11 (INS shall
11 place minors in the “least restrictive setting appropriate to the minor’s age and
12 special needs” while ensuring that the setting is consistent with “protect[ing] the
13 minor’s well-being and that of others”). In order to address the “vagueness” concern,
14 in the final rule HHS added language stating that ORR’s ability to place minors in
15 secure facilities based on danger to self or others “does not abrogate any
16 requirements to place UACs in the least restrictive setting appropriate to their age
17 and special needs.” 45 C.F.R. § 410.203(d). Moreover, under the hearing
18 provisions, the minor has the opportunity to have an independent hearing officer
19 review ORR’s determination as to whether the minor poses a danger to self or others.
20 45 C.F.R. § 410.810.

21 Plaintiffs also argued that the hearing provided to children under 45 C.F.R.
22 § 410.810 and Paragraph 24.A must be conducted by the Department of Justice

23 ⁶ Paragraph 21 of the Agreement defines conditions under which a minor may be
24 placed in a secure facility, including a determination that the minor “has committed,
25 or has made credible threats to commit, a violent or malicious act (whether directed
26 at himself or others)” while in custody; “has engaged, while in a licensed program,
27 in conduct that has proven to be unacceptably disruptive of the normal functioning
28 of the licensed program in which he or she has been placed and removal is necessary
to ensure the welfare of the minor or others;” and “must be held in a secure facility
for his or her own safety.”

1 rather than HHS. As explained above, this is not a substantive change to the
2 protections set out in the Agreement and provides the same procedural protections
3 outlined by the Ninth Circuit, *Flores*, 862 F.3d at 878; *see* 84 Fed. Reg. at 44,476–
4 77 (“independent hearing process that would be guided by the immigration judge
5 bond hearing process currently in place” where child “could choose to be
6 represented by a person of his or her choosing, at no cost to the government” and
7 “could present oral and written evidence to the hearing officer and could appear by
8 video or teleconference.”). It is appropriate for an independent HHS hearing officer
9 to conduct such a review—which does not derive from current immigration
10 statutes—given that HHS is statutorily charged with custody of unaccompanied
11 minors and because, at the time of the Agreement, such hearings also were
12 performed within the same agency. *See* 44 Fed. Reg. at 44,476–77; *Flores*, 862 F.3d
13 at 875 (agreeing there was a “failure to address bond hearings in the HSA and
14 TVPRA” as “neither statute [HSA or TVPRA] so much as mentions bond hearings
15 for unaccompanied minors”); *id.* at 879 (function should be performed “regardless
16 of which agency may now be charged with” the function because Agreement may
17 be followed even after a “bureaucratic reorganization”). Because HHS is charged
18 with the care of UACs, it would be inappropriate for immigration judges within the
19 Department of Justice to make determinations regarding HHS custodial issues.

20 Plaintiffs’ final argument in the Motion to Enforce was that the regulations
21 removed the word “shall,” and made requirements under the Agreement optional in
22 the rules. Mot. at 13–14. This contention is not correct. Instead, each of the
23 examples cited by Plaintiffs—that licensed programs be non-secure, that the minor
24 be placed in the least restrictive setting, that bond redeterminations hearings occur,
25 and that the minor receive notice regarding secure detention decisions—are
26 requirements set out in the regulations and are not optional. *See* 8 C.F.R. § 236.3(e)
27 (during an influx, “DHS *will transfer* a minor who is not a UAC . . . to a licensed
28 facility . . . *as expeditiously as possible*” and within three or five days if there is not

1 an influx) (emphasis added); *id.* § 236.3(i) (accompanied minors “*shall be placed*
2 temporarily in a licensed facility, which will be non-secure”) (emphasis added); *id.*
3 § 236.3(g)(2) (“minors and UACs *shall be held in the least restrictive setting*
4 *appropriate*”); *id.* § 236.3(i) (accompanied minors in family units “*shall be detained*
5 *in the least restrictive setting appropriate*”); 45 C.F.R. § 410.810 (UAC “may
6 request” a hearing by an independent hearing officer); *id.* § 410.810(a) (if minor not
7 placed in licensed program, ORR “shall provide a notice of the reasons”).⁷ As the
8 Ninth Circuit has explained, “[t]he Supreme Court has long recognized that a federal
9 agency is obliged to abide by the regulations it promulgates.” *Sameena Inc. v. U.S.*
10 *Air Force*, 147 F.3d 1148, 1153 (9th Cir. 1998). None of these rationales provides
11 a basis to override the reasoned decision-making reflected in the final rules.

12 **3. The Agreement Expressly Incorporates APA Standards that**
13 **Require the Consideration of Agency Expertise and Public**
14 **Comments and Necessarily Prohibit any Preordained Outcome.**

15 As just explained, the final rule implements the Agreement without significant
16 changes, other than to fill in gaps left unaddressed by the Agreement relating to
17 families traveling together and other non-substantive changes. The provisions of the
18 rule achieve the overarching purposes of the Agreement, namely—to “set[] out
19 nationwide policy for the detention, release, and treatment of minors” in immigration
20 custody, to “publish the relevant and substantive terms of [the] Agreement,” and to
21 ensure that minors are treated “with dignity, respect, and special concern for their
22 particular vulnerability as minors.” Agreement ¶¶ 9, 11. The parties agreed to an
23 APA process to replace the Agreement, and any challenge to the Rule accordingly
24

25 ⁷ Section 236.3(h), which provides that family units “may be transferred to an FRC”
26 is written to establish that DHS has authority to make such a transfer, not to suggest
27 that DHS may detain families in non-FRCs. Instead, as Section 236.3(e) makes
28 clear, DHS “will transfer” the family unit “as expeditiously as possible.” Hearings
that “may” be requested under Section 410.810 are also not optional—they are
mandatory when requested.

1 must be separately brought consistent with the APA and INA. The rule therefore
2 replaces the Agreement and no further inquiry by this Court is appropriate.

3 a. APA Standards of Review Apply to Any Review of the New
4 Rules.

5 Here, the government has promulgated the final rule consistent with the
6 requirements of the APA, which the Agreement required for termination upon the
7 promulgation of rules. Stipulation (Dec. 12, 2001), ECF No. 13 (“all terms of this
8 agreement shall terminate 45 days following [Defendants’] publication of final
9 regulations implementing this agreement.”). Section 4 of the APA, 5 U.S.C. § 553,
10 prescribes a three-step procedure for “notice-and-comment rulemaking.” First, the
11 agency must issue a “[g]eneral notice of proposed rule making,” ordinarily by
12 publication in the Federal Register. 5 U.S.C. § 553(b). Second, when “notice [is]
13 required,” the agency must “give interested persons an opportunity to participate in
14 the rule making through submission of written data, views, or arguments.” *Id.* §
15 553(c). “An agency must consider and respond to significant comments received
16 during the period for public comment.” *See Perez v. Mortg. Bankers Ass’n*, 135 S.
17 Ct. 1199, 1203 (2015) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401
18 U.S. 402, 416 (1971)). Third, when the agency promulgates the final rule, it must
19 include in the rule’s text “a concise general statement of [its] basis and purpose.” 5
20 U.S.C. § 553(c). In sum, before an agency makes a rule, it normally must notify the
21 public of the proposal, invite them to comment on its shortcomings, consider and
22 respond to their arguments, and explain its final decision in a statement of the rule’s
23 basis and purposes. *Perez*, 135 S. Ct. at 1211.

24 Such rules are then subject to judicial review under terms set out by Congress
25 in the APA. *See* 5 U.S.C. §§ 701–06. Rules are reviewed to determine if they are
26 “arbitrary [or] capricious,” “contrary to constitutional right,” “in excess of statutory
27 . . . authority,” or “unsupported by substantial evidence.” *Id.* § 706(A), (E).

1 These requirements apply to *every* substantive rule, and there is no exception
2 for rules implementing an agreement with private parties like the Agreement in this
3 case. In other words, consistent with the APA, Plaintiffs cannot bind the agency to
4 issue rules containing set provisions, evade the standard governing judicial review
5 of those provisions, or impose a review standard different from that provided by the
6 APA. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (APA
7 “sets forth the full extent of judicial authority to review executive agency action for
8 procedural correctness” and “permits . . . the setting aside of agency action that is
9 ‘arbitrary’ or ‘capricious’”).

10 The parties expressly agreed that the APA would apply to the rules
11 implementing the Agreement when they agreed to its termination upon the
12 “publication of rules implementing the Agreement.” Agreement ¶ 11. Moreover,
13 the parties understood and continue to understand that the promulgation of rules
14 includes—as it must—the normal APA process, whereby the rules would not mimic
15 the terms of the Agreement but reflect reasonable policy judgments based on current
16 circumstances and comments from the public. For example, Plaintiffs submitted
17 comments on the then-pending proposed rules at the time the Agreement was
18 extended, after the agency first published proposed rules implementing the
19 agreement. *See* 67 Fed. Reg. 1670 (“offer[ing] the public an additional opportunity
20 to comment on the proposed rule, and particularly invites comments that relate to
21 issues that have come to the public's attention since the close of the original comment
22 period in 1998” such as “who speaks for the child with respect to immigration
23 matters”); Joint Comments of the Center for Human Rights and Constitutional Law;
24 the Youth Law Center; and The Women’s Commission For Refugee Women &
25 Children, filed March 15, 2002.

26 Further, in 2003, shortly after the Agreement was extended, Plaintiffs “[a]s
27 class counsel” in *Flores*, submitted a policy paper “to provide a framework for
28 discussing policy options.” ORR Working Paper (Jan. 14, 2003). That paper stated

1 any final rules should “incorporate[e] . . . prior comments” submitted under the APA
2 and reflect “learning from the first five years under the Settlement Agreement.” *Id.*
3 The Plaintiffs argued that the regulations should also reflect the “logistics and
4 challenges of [ORR’s] responsibilities for unaccompanied children” and be “based
5 on [ORR’s] own experience with unaccompanied children.” *Id.* The letter “urge[d]
6 ORR to propose new regulations based on its own experience with unaccompanied
7 children, and then solicit extensive comments from advocates and interest groups
8 before publishing final regulations.” *Id.* The letter also stated that rules should be
9 “consistent with the terms of the Settlement Agreement.” In other words, Plaintiffs
10 agreed that a rulemaking process resulting in rules that *differ* from the terms of the
11 Agreement would be “*consistent with the*” Agreement. *Id.* (emphasis added). The
12 rules cannot woodenly repeat the terms of the Agreement while also being “new”
13 and “based on [the agency’s] own experience with unaccompanied children,”
14 “incorporating . . . comments” as required under the APA and reflecting “learning
15 from the first five years under the . . . Agreement.” *Id.* If the final rule had to be
16 identical to the Agreement, there would be no point to issuing regulations and it
17 would be superfluous for the Agreement to include a provision for termination upon
18 issuance of regulations. Instead, the only viable standard for evaluating the new
19 rules are those Congress provided and the Agreement incorporates, namely—the
20 APA.

21 More recently, Plaintiffs recommitted to the understanding that the APA
22 process applies, by submitting comments in response to the proposed rules as
23 “counsel to the plaintiff class in Flores.” *See* Class Counsel Comments at 3 (Nov.
24 6, 2018). In those comments, class counsel at times demanded the final rules
25 conform to the Settlement Agreement. *See id.* at 1. But counsel also urged *changes*
26 from the Agreement, arguing that provisions of the Agreement regarding the
27 definition of “influx” are “out of date and must be revised to reflect operational
28 realities.” *Id.* at 14. Additionally, counsel urged that provisions of the Agreement

1 relating to secure placement of minors have been abrogated by statute, and the rules
2 must therefore depart from the Agreement. *Id.* at 21–22. There is only one plausible
3 standard to review those changes given that the Agreement terminates upon
4 conducting an APA regulatory process – and one that Plaintiffs cannot help but
5 acknowledge in requesting changes: the standard provided by the APA.

6 Any other approach would render the APA rulemaking process a nullity. For
7 example, if the court took the view that agency decision-makers were bound to
8 finalize only the terms of the Agreement as written in 1997, decision-makers would
9 be required to reach a decision on whether a rule should be issued and the contours
10 of that rule *prior* to final agency action. Such a preordained result is inconsistent
11 with basic APA formal rulemaking requirements such as notice and comment and
12 cost-benefits analysis. 5 U.S.C. § 553. In fact, the parties acted against the backdrop
13 of a 1998 proposed rule that was based on the substantive terms of the Agreement.
14 *See* 63 Fed. Reg. 39,759 (July 24, 1998). The proposed rule was far less
15 comprehensive and protective than the current final rule.⁸ And if regulations
16 identical to the Agreement had been promulgated at that time, surely the agencies
17 would not have been barred from amending them now – it should be no different.

18 Congress intended these APA procedures to improve the quality of
19 information available for rulemaking, to compel reexamination of the proposed rule
20 in light of the arguments adduced during the comment period, and to facilitate
21 judicial review by incorporation of this information into a rulemaking record. *See*
22 *Nat'l Soft Drink Ass'n v. Block*, 721 F.2d 1348, 1353 (D.C. Cir. 1983); *Vermont*
23 *Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 549
24 (1978) (in reviewing agency action, a court is ordinarily limited to evaluating the
25 agency's contemporaneous explanation in light of the existing administrative
26

27 ⁸ For example, the 1998 proposed rule did not include the requirements for licensed
28 facilities contained in Exhibit 1 of the Agreement. The Exhibit 1 standards are
included in the current final rule at 8 C.F.R. § 236.3(i)(4) and 45 C.F.R. § 410.402.

1 record). Importantly, “legislative facts adduced in rulemaking partake of agency
2 expertise, prediction, and risk assessment;” these facts are “not easily assessed in
3 terms of an empirically verifiable condition.” *Ass’n of Nat’l Advertisers, Inc. v.*
4 *F.T.C.*, 627 F.2d 1151, 1168 (D.C. Cir. 1979). Thus, a rulemaking necessarily
5 entails debate over these factual issues and the policy questions to which they
6 pertain. *Id.* All of this is provided for under the APA process to advance the
7 evolution of considered policy. It is entirely inconsistent with the APA for a
8 decisionmaker to approach rulemaking with an “unalterably closed mind on matters
9 critical to the disposition.” *Id.* This is particularly true when, as here, the prior
10 policy was implemented over 20 years ago and circumstances at the border have
11 changed dramatically during that time. Consequently, in order to avoid collision
12 between the Agreement and the APA—and to escape absurd results not intended by
13 the parties at the time of contracting—determination of whether “implementation”
14 of the Agreement is satisfied must be evaluated pursuant to the requirements of the
15 APA’s rulemaking process. 5 U.S.C. § 553.

16 b. APA Standards are Satisfied Here.

17 Any challenge to the new rules must be brought consistent with the APA. The
18 complaint in this action—filed over thirty years ago—obviously does not challenge
19 the new rules. This is true even though this case asserted constitutional claims and
20 the Settlement Agreement resolved those constitutional claims. *See Fox Television*,
21 556 U.S. at 516 (rejecting argument that “more stringent . . . review [applies] to
22 agency actions that implicate constitutional liberties”). The Parties agreed that the
23 Agreement would terminate upon completion of an APA rulemaking process, and
24 thus the APA’s standards for judicial review of such rules should govern any
25 challenges to the rule. Individuals who claim to be adversely impacted by the new
26 rule have a remedy because they may pursue any cause of action related that would
27 otherwise be available.
28

1 Even if the new rules were subject to APA review in this action as currently
2 pled, they readily satisfy those standards. For the reasons explained in Section 1,
3 the rule is the product of extensive and appropriate notice-and-comment procedures.
4 Specifically, the notice-and-comment process included consideration of 100,073
5 comments from the public, including not only *Flores* class counsel, but also other
6 noteworthy immigration and child advocacy organizations such as the American
7 Academy of Pediatrics, American Psychiatric Association, National Association of
8 Pediatric Nurse Practitioners, Center for Children’s Law and Policy, National
9 Immigrant Justice Center, and the Legal Aid Justice Center. The government, in
10 turn, provided nearly 150 Federal Register pages of consolidated responses and
11 made modifications to the proposed regulation based on public input. Where the
12 regulation is different from the Agreement, the agencies provided a “reasoned
13 explanation” for the difference and, in any event, the overarching goals of the
14 Agreement remain intact. *See Fox Television*, 556 U.S. at 515; *see* Preamble pp.
15 403, *et seq.* (explaining departures from Flores Settlement Agreement).
16 Accordingly, as required by the APA, the rule properly considered and incorporated
17 comments from the public and explained the judgments of DHS and HHS regarding
18 current operational circumstances.⁹

19 c. The Rules Comport with the Due Process Clause.

20 The Agreement resolved claims brought under the Due Process Clause. Even
21 if the Court thought it appropriate to consider whether the new rules comport to the
22 Due Process Clause, they would need to show the rules were invalid on their face.
23 *See Flores*, 507 U.S. at 300–01 (evaluating Plaintiffs’ facial constitutional challenge
24 to newly adopted regulations notwithstanding the parties’ prior care agreement
25 governing conditions of confinement for juveniles). And Plaintiffs “in such a case

26 ⁹ If the Court decides to review the final regulations under the APA, the government
27 requests that the parties be given the opportunity to brief the issues seriatim, given
28 the importance of the issues and the Court’s order that this briefing address the sole
issue of whether the regulations are consistent with the Agreement. ECF No. 525.

1 must establish that that no set of circumstances exist under which the [regulation]
2 would be valid.” *Id.* at 301.

3 The new rule easily survives facial constitutional scrutiny. The regulation
4 overwhelmingly adopts the provisions of the Agreement and is the result of
5 considered deliberation, including public input, guided by the agencies’ expertise
6 managing the Agreement for more than twenty years. Assuming the regulation
7 implicates a protected liberty interest, the rules comport with substantive and
8 procedural due process. Specifically, as the Supreme Court held in this case, “where
9 the government does not intend to punish the child, and where the conditions of
10 governmental custody are decent and humane, such custody surely does not violate
11 the Constitution.” *Flores*, 507 U.S. at 303. Indeed, the *Flores* Court specifically
12 recognized that “Congress has the authority to detain aliens . . . pending their
13 deportation hearings.” *Id.* at 306. The custody regime here is far more protective
14 than that approved by the *Flores* Court—here, UACs are subject to all of the same
15 protections as set forth in the Agreement, and non-UACs may remain with a parent
16 or legal guardian in custody during the pendency of immigration proceedings, not
17 alone; may receive discretionary release on bond or parole under the standard set out
18 in the Agreement (as consistent with the statute and regulations); and may be
19 released to an adult relative other than a parent or legal guardian in DHS’s discretion.
20 *See id.* at 305. As the new rules satisfy due process standards in a facial challenge,
21 any future legal action would be subject to an individualized inquiry and challenge.
22 *See id.* at 314 (“period of custody is inherently limited by the pending deportation
23 hearing” and habeas corpus available to address if “juveniles are being held for
24 undue periods”).

25 **B. Promulgation of the Rule Terminates the Agreement Under the HSA**

26 The Agreement terminates for an additional reason—because Congress
27 expressly gave HHS and DHS the authority to terminate legacy agency actions,
28 including agreements like the Agreement, in enacting the HSA. The HSA contained

1 a provision regarding legacy agency actions that provides that “[c]ompleted
2 administrative actions”—defined to include both regulations and “agreements”—
3 “shall not be affected . . . but shall continue in effect . . . until amended, modified,
4 terminated, set aside, or revoked in accordance with law by an officer of the United
5 States or a court of competent jurisdiction.” 6 U.S.C. § 552(a); *see also* 6 U.S.C.
6 § 279(f)(2) (incorporating by reference the savings clause of the HSA into the
7 TVPRA). The Ninth Circuit has specifically held that the Flores Settlement
8 Agreement is a “completed administrative action[]” under this statute and “remains
9 in effect as an ‘agreement’ preceding the passage of the HSA.” *Flores*, 862 F.3d at
10 870. Because the Ninth Circuit has held that it is an agreement under this provision,
11 Congress expressly authorized it to be “amended, modified, terminated . . . or
12 revoked . . . by an officer of the United States.” The final rule expressly invokes that
13 provision, and accordingly terminates the Agreement. *See* 84 Fed. Reg. at 44,399
14 (“The savings clause has been interpreted by courts to have maintained the FSA as
15 enforceable against HHS and DHS. By promulgating these final rules, HHS and
16 DHS are completing an administrative action to terminate the FSA.”).

17 **C. Continued Application of the Agreement is Not Equitable or in the**
18 **Public Interest Because the Regulation Provides a Comprehensive**
19 **Scheme Governing the Custody of Alien Minors**

20 Even if this Court were to view the Agreement as imposing a standard
21 different from the APA to assess its termination, the Agreement should be
22 terminated because it is no longer equitable or in the public interest to have a
23 substantial portion of the immigration system administered through the judicial and
24 not the executive branch. First, the standards for institutional litigation require
25 flexibility in terminating agreements of this sort that govern governmental
26 operations, and declining to terminate would impinge upon the separation of powers.
27 Second, it is in the public interest to terminate the Agreement based on changes in
28 the legal and factual landscape, including the massive increase in family migration,

1 intervening legislation, and now the publication of final rules governing this
2 significant aspect of the immigration system.

3 **1. Courts Must Be Flexible To Release Governmental Operations**
4 **from Long Term Institutional Consent Decrees.**

5 The Agreement squarely implicates the concerns courts have identified with
6 long-term consent decrees. The Agreement has been treated as a consent decree,
7 and such a decree “is subject to the continuing supervisory jurisdiction of the court,
8 and therefore may be altered according to subsequent changes in the law.” *Miller v.*
9 *French*, 530 U.S. 327, 347–48 (2000) (citing *Rufo, v. Inmates of Suffolk Cty. Jail*,
10 502 U.S. 367, 388 (1992)). Federal Rules of Civil Procedure 60(b)(5) and (6)
11 provides that the Court may relieve a party from “a final judgment, order, or
12 proceeding [if] applying [the prior action] prospectively is no longer equitable,” or
13 for “any other reason that justifies relief.” Fed. R. Civ. P. 60(b)(5), (6); *see Frew ex*
14 *rel Frew v. Hawkins*, 540 U.S. 431, 441(2004) (“The Rule encompasses the
15 traditional power of a court of equity to modify its decree in light of changed
16 circumstances.”); *McGrath v. Potash*, 199 F.2d 166, 167–68 (D.C. Cir. 1952) (“The
17 statutory basis for the injunction having been removed by Congress, the injunction
18 should be vacated”). The party seeking relief “bears the burden of establishing that
19 a significant change in circumstances warrants revision of the decree.” *Rufo*, 502
20 U.S. at 383. That burden may be met by showing “a significant change either in
21 factual conditions or in law.” *Id.* at 384.

22 As the Supreme Court has explained, “the passage of time frequently brings
23 about changed circumstances—changes in the nature of the underlying problem,
24 changes in governing law or its interpretation by the courts, and new policy
25 insights—that warrant reexamination of the original judgment.” *Horne v. Flores*,
26 557 U.S. 443, 448 (2009). Permitting the change or termination of a consent decree
27 in light of a change in law makes sense because consent “is to be read as directed
28 toward events as they then were. It was not an abandonment of the right to exact

1 revision in the future, if revision should become necessary in adaptation to events to
2 be.” *Sys. Fed’n No. 91, Ry. Employees’ Dep’t, AFL-CIO v. Wright*, 364 U.S. 642,
3 651 (1961) (quoting *United States v. Swift & Co.*, 286 U.S. 106, 114–15 (1932)).
4 Indeed, “prospective relief *must* be modified” where the agreement would conflict
5 with subsequently enacted federal law. *Miller v. French*, 530 U.S. 327, 347–48
6 (2000) (quoting *Rufo*, 502 U.S. at 388).

7 Institutional reform decrees involving government operations require an even
8 more flexible approach to termination. In *Horne*, 557 U.S. at 439, in the context of
9 institutional litigation that involved enforcement of a nine-year-old order, the
10 Supreme Court criticized the lower courts for focusing too narrowly on the terms of
11 the decree, and not focusing instead on the broader question, *viz.*, “whether, as a
12 result of the important changes during the intervening years, the State was fulfilling
13 its obligations under the [law] by other means.” *Id.* The Court went on to observe
14 that a “flexible approach” to modifying consent decrees allows courts to “ensure that
15 responsibility for discharging the State’s obligations is returned promptly to the State
16 and its officials when the circumstances warrant.” *Id.* at 448 (internal quotations and
17 citations omitted). Indeed, “[i]f a durable remedy has been implemented, continued
18 enforcement of the order is not only unnecessary, but improper,” *id.* at 450, and the
19 “longer an injunction or consent decree stays in place, the greater the risk that it will
20 improperly interfere with a State’s democratic process,” *id.* at 453.

21 In *Rufo*, when a defendant moved to modify a consent decree ten years after
22 its entry, the Supreme Court noted that “the public interest is a particularly
23 significant reason for applying a flexible modification standard in institutional
24 reform litigation because such decrees reach beyond the parties involved directly in
25 the suit and impact the public’s right to the sound and efficient operation of its
26 institutions.” 502 U.S. at 376, 381–382; *see also In re Pearson*, 990 F.2d 653, 658
27 (1st Cir. 1993) (district court “not doomed to some Sisyphean fate, bound forever to
28 enforce and interpret a preexisting decree without occasionally pausing to question

1 whether changing circumstances have rendered the decree unnecessary, outmoded,
2 or even harmful to the public interest.”); *Heath v. De Courcy*, 888 F.2d 1105, 1110
3 (6th Cir. 1989) (public interest in modifying institutional consent decrees—which
4 typically involve significant public interests—will ordinarily outweigh the interest
5 of preserving the decree where sufficient reason for modification is shown).

6 As the Supreme Court has stated time and again, when a consent decree binds
7 elected officials, it may “improperly deprive future officials of their designated
8 legislative and executive powers.” *Horne*, 557 U.S. at 449 (2009) (quoting *Frew*,
9 540 U.S. at 441 (2004)). And these concerns are heightened when a decree binds
10 *federal* operations, as in those circumstances a long term decree threatens the
11 constitutional separation of powers. As the D.C. Circuit has explained, there are
12 “potentially serious constitutional questions about the power of the Executive
13 Branch to restrict its exercise of discretion by contract with a private party.”
14 *National Audubon Society v. Watt*, 678 F.2d 299, 301 (D.C. Cir. 1982); *see Alliance*
15 *To End Repression v. City of Chicago*, 742 F.2d 1007, 1020 (7th Cir. 1984)
16 (interpreting FBI consent decree to ensure that “coequal branch of government” did
17 not “improvidently surrender[] its obligations”; thus “maintain[ing] a proper
18 separation of powers”); *The Money Store, Inc v. Harriscorp Finance Inc.*, 885 F.2d
19 369, 375–376(7th Cir. 1989) (Posner, J., concurring).

20 The *Rufo* Court went on to stress that “the public interest and considerations
21 based on the allocation of powers within our federal system require that the district
22 court defer to [government officials] who have the primary responsibility for
23 elucidating, assessing, and solving the problems of institutional reform, to resolve
24 the intricacies of implementing a decree modification.” 502 U.S. at 392. These
25 concerns are paramount in cases involving immigration, where judicial management
26 represents “a substantial intrusion” into the workings of the political branches
27 entrusted to manage policies towards aliens. *Arlington Heights v. Metro. Hous. Dev.*
28 *Corp.*, 429 U.S. 252, 268, n.18 (1977); *see Overton Park*, 401 U.S. at 420; *see*

1 *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–589 (1952) (“[A]ny policy toward
2 aliens is vitally and intricately interwoven with contemporaneous policies in regard
3 to the conduct of foreign relations [and] the war power.”). Indeed, the Supreme
4 Court recognized these principles twenty-five years ago in this very litigation.
5 *Flores*, 507 U.S. at 305 (“For reasons long recognized as valid, the responsibility for
6 regulating the relationship between the United States and our alien visitors has been
7 committed to the political branches of the Federal Government.”)

8 One of the underpinnings for this long-recognized proposition is that
9 immigration policy involves “changing political and economic circumstances” that
10 are appropriate for the Legislature or Executive to determine, not the Judiciary.
11 *Mathews v. Diaz*, 426 U.S. 67, 81 (1976); *Flores*, 507 U.S. at 305–06. This concern
12 has particular force with respect to a consent decree designed to address due process
13 claims, where a range of circumstances and changing equities impact the basis for
14 claims here brought on a class-wide basis. *See Mathews*, 426 U.S. at 81 (“Any rule
15 of constitutional law that would inhibit the flexibility of the political branches of
16 government to respond to changing world conditions should be adopted only with
17 the greatest caution”); *supra* § III.A.3.c (explaining why new rules are facially
18 consistent with Due Process Clause)

19 The Court must be especially solicitous of this request to terminate the
20 Agreement because the political and foreign policy implications and respect for the
21 political branches’ authority over immigration policy dictate a narrow standard of
22 judicial review over executive and legislative decisions in the realm of immigration,
23 *Fiallo v. Bell*, 430 U.S. 787, 796 (1977); *see also Hampton v. Mow Sun Wong*, 426
24 U.S. 88, 101 (1976) (emphasizing that the “power over aliens is of a political
25 character and therefore subject only to narrow judicial review”) (citation omitted).
26 To avoid the long-term transfer of executive power to the judiciary or private groups,
27 the Supreme Court mandates that federal courts take a “flexible approach” when
28 deciding motions to modify or dissolve consent decrees. *Horne*, 557 U.S. at 450.

1 Thus, courts may superintend the execution of the immigration laws—which must
2 be rare indeed to begin with—only for as long as is truly necessary and must
3 promptly return the responsibility for discharging the Government’s obligations
4 when “changed circumstances warrant.” *Id.* These changed circumstances do not
5 need to be either radical or sweeping; rather, it is sufficient that a “significant
6 change” in factual circumstances or law “renders the continued enforcement of the
7 judgment detrimental to the public interest.” *Id.* at 453 (quoting *Rufo*, 502 U.S. at
8 384).

9 **2. Under These Standards The Public Interest Requires Termination**
10 **of This Outdated Agreement in Institutional Litigation.**

11 Under the standards set forth above, the Agreement must be terminated
12 because the public interest no longer justifies operation of major portions of the
13 immigration system pursuant to an agreement entered by consent that by its terms
14 are intended to be temporary, given the issuance of legislative rules, dramatic
15 changes in circumstances, and intervening legislation. The Agreement has now
16 bound four Presidential administrations charged by the people with developing
17 immigration policy, and two agency defendants—DHS and HHS—that were never
18 defendants in Plaintiffs’ complaint. In fact, HHS was assigned functions by
19 Congress in direct response to the types of concerns raised in this litigation and
20 charged with improving the treatment of UACs, a mission it takes very seriously and
21 of which these regulations are a key part. The Agreement has governed under
22 circumstances where there is now a growing crisis at our southern border due to
23 massive increases in family migration never envisioned by government
24 policymakers or Plaintiffs in 1997. Authority over this large segment of immigration
25 policy must now be returned to the normal democratic processes that answers to the
26 people.
27
28

1 a. The Agreement Should Terminate Because of the Promulgation
2 of Regulations.

3 The public interest requires the decree to terminate because the government
4 has now taken the significant step of issuing final, comprehensive regulations
5 governing all aspects of the government's custody of minors—both accompanied
6 and unaccompanied. It has done so as provided for in the Agreement itself, *see*
7 Agreement ¶ 40 (as amended), and at the urging of both this Court, *see* ECF No. 177
8 at 24, and the Ninth Circuit, *Flores*, 862 F.3d at 869. The promulgation of these
9 regulations conformed to APA procedural requirements imposed by Congress for
10 regulations having the force of law. These procedural requirements “assure fairness
11 and mature consideration of rules of general application.” *NLRB v. Wyman-Gordon*
12 *Co.*, 394 U.S. 759, 764 (1969). The final rule is more than sufficient reason to
13 terminate the Agreement, because it is a fundamental change in law implementing
14 the goals of the Agreement that can be evaluated on its own terms as appropriate.
15 Indeed, continued enforcement of the Agreement, which was temporary by its terms
16 in contemplation of such rulemaking, is not in the public interest now that the
17 government officials tasked with elucidating, assessing, and solving problems that
18 occur in immigration enforcement have issued comprehensive final regulations.
19 Continued application of the twenty-two-year-old Agreement, notwithstanding the
20 issuance of comprehensive regulations, would encroach on the Executive's authority
21 to carry out its constitutional powers over immigration, as well as the public's
22 substantial interest in having the details of immigration policy determined by the
23 people, within statutory and constitutional limits.

24 When the *Flores* suit was filed in the 1980s and the parties later entered into
25 the Agreement, there was limited federal law governing the detention of alien
26 minors, and “the problem was apparently dealt with on a regional and ad hoc basis.”
27 *Flores*, 507 U.S. at 295. The litigation was focused on unaccompanied minors, and
28 the Agreement accordingly contains no provisions specifically addressing the

1 distinct circumstances and issues concerning minors apprehended with their parents.
2 And the Agreement's purpose, by its own terms, was to temporarily "set[] out
3 nationwide policy for the detention, release, and treatment of minors in the custody
4 of the INS" until rules could be promulgated. Agreement ¶ 9. The final regulations
5 now achieve this goal of a permanent and abiding set of rules governing the
6 treatment of minors in immigration custody. The notice-and-comment process here
7 was comprehensive, involving consideration of 100,073 comments from the public.
8 The government, in turn, provided nearly 150 Federal Register pages of consolidated
9 responses and made modifications to the proposed regulation based on public input.
10 The rule explains in detail why the approaches it takes are called for by current
11 circumstances at the various agencies and components that have responsibility for
12 the custody of minors at various points in time. This is the process Plaintiffs' counsel
13 called for in the Agreement and has continued to call for since that time. *See* 2003
14 Comments (ORR must issue new rules based on its experience). Consequently, the
15 rigorous process that produced the rule involved a far more thorough, comprehensive
16 analysis and review than that which shaped the Agreement, which provided no
17 opportunity for public input, it implements, and rules far more protective than those
18 issued back in 1998.

19 Courts have readily vacated settlement agreements when the goals of the
20 settlement have been met. *See, e.g., United States v. City of Miami*, 2 F.3d 1497,
21 1505 (11th Cir. 1993) ("A court faced with a motion to terminate . . . a consent
22 decree must begin by determining the basic purposes of the decree."). For example,
23 the Ninth Circuit instructs district courts deciding a motion to vacate a settlement
24 agreement to first consider "the more general goals of the [consent] decree which
25 the terms were designed to accomplish." *Jeff D. v. Otter*, 643 F.3d 278, 288 (9th
26 Cir. 2011) (quoting *Youngblood v. Dalzell*, 925 F.2d 954, 960 (6th Cir.1991)). The
27 Ninth Circuit has likewise reversed a district court's termination of a consent decree
28 for "failing to explicitly consider the goals of the decree and only evaluating

1 compliance with individual action items.” *Rouser v. White*, 825 F.3d 1076, 1081
2 (9th Cir. 2016).

3 Numerous courts have held that termination of a settlement agreement is
4 appropriate if the district court concludes that the agreement “is clearly no longer
5 necessary” to uphold the agreement’s goals. *City of Miami*, 2 F.3d at 1508. This
6 rationale was applied in *Patterson v. Newspaper & Mail Deliverers' Union of New*
7 *York & Vicinity*, where the Second Circuit upheld the district court’s vacatur of a
8 consent decree after the court concluded that the decree’s stated objective of 25
9 percent minority representation in the newspaper delivery industry had been met.
10 *Patterson*, 13 F.3d 33, 38 (2d Cir. 1993). Since “the decree [had] served its
11 purpose,” the Second Circuit held that “all of its provisions may be ended.” *Id.* at
12 39. Finally, the Second Circuit reasoned that “the flexible standard for modifying
13 [consent] decrees . . . entitles a court of equity to focus on the dominant objective of
14 the decree and to terminate the entire decree once that objective has been reached.”
15 *Id.* Similarly, in *Culbreath v. Dukakis*, the district court held that dismissal of a
16 consent decree was warranted where defendants were achieving goals equal to, or
17 greater than, the goals specified in the consent decree. *See Culbreath v. Dukakis*,
18 695 F. Supp. 1350 (D. Mass. 1988).

19 The reasoning underlying these guiding principles applies with even greater
20 force here. As the Second Circuit held in *Patterson*, where a consent decree seeks
21 pervasive change in long-established practices affecting significant numbers of
22 people, and the changes are sought to vindicate significant rights of a public nature,
23 “it is appropriate to apply a flexible standard in determining when modification or
24 termination should be ordered in light of either changed circumstances or substantial
25 attainment of the decree’s objective.” *Patterson*, 13 F.3d at 38. The government’s
26 promulgation of regulations governing the custody of minors satisfies the
27 overarching objectives of the Agreement seeking a permanent set of comprehensive
28 rules governing the treatment of minors in immigration custody. Accordingly, the

1 Agreement “is clearly no longer necessary” and should be terminated. *City of*
2 *Miami*, 2 F.3d at 1508.

3 b. The Agreement Should Terminate Because of Unprecedented
4 Increase in Family Migration Since 1997.

5 It is in the public interest to terminate the Agreement given the dramatic
6 changes in family migration since 1997. The Supreme Court explained in this case
7 that “[f]or reasons long recognized as valid, the responsibility for regulating the
8 relationship between the United States and our alien visitors has been committed to
9 the political branches of the Federal Government.” *Flores*, 507 U.S. at 305. Keeping
10 the Agreement in place and thereby preventing the Executive from taking new
11 approaches to addressing this unprecedented surge of family migration is
12 inconsistent with the Supreme Court’s admonition in this very case and not in the
13 public interest.

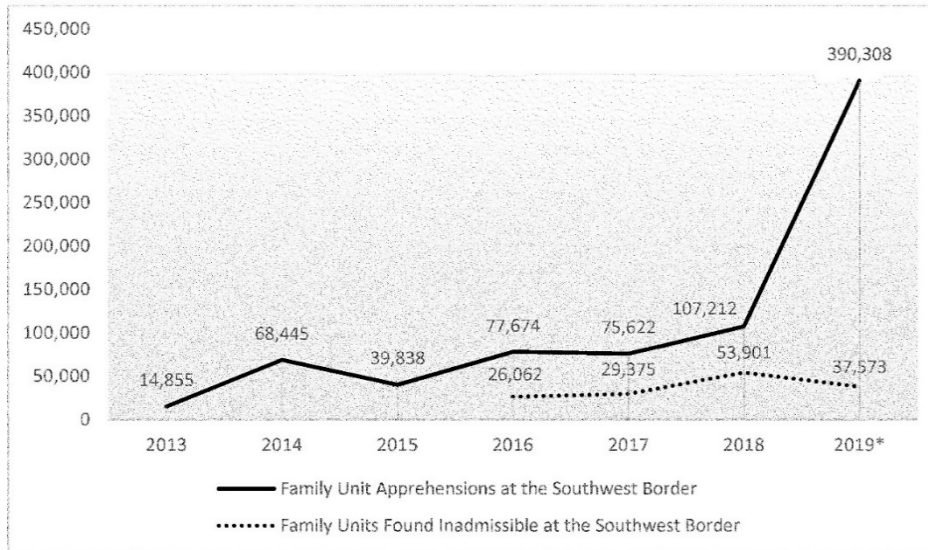
14 Since the Agreement, the number of alien minors arriving in the United States,
15 both accompanied and unaccompanied, has skyrocketed. In 1993, the Supreme
16 Court recognized that a surge of “more than 8,500” minors during a one-year
17 period—2,500 with families, and 6,000 unaccompanied—represented a “problem”
18 that is “serious.” *Reno*, 507 U.S. at 294. That “problem” number in the mid-1990s
19 was the normal number of unaccompanied minors apprehended until about 2012.¹⁰
20 In 2003, Flores class counsel discussed the unprecedented increase in the number of
21 minors in immigration custody—from “130 in custody in 1996, to an average of
22 nearly 500 juveniles in custody in 2000.” 2003 Class Counsel Comments.
23
24

25 ¹⁰ See U.S. Department of Health and Human Services, Administration for Children
26 and Families, Office of Refugee Resettlement, Unaccompanied Alien Children
27 Program, *Fact Sheet* (May 2014) (before FY 2012, an average of 7,000 to 8,000
28 UACs were typically placed in ORR custody each year),
[https://www.acf.hhs.gov/sites/default/files/orr/unaccompanied_childrens_services_
fact_sheet.pdf](https://www.acf.hhs.gov/sites/default/files/orr/unaccompanied_childrens_services_fact_sheet.pdf).

But even those numbers pale in comparison to what is faced today. Regularly, over 10,000 UACs are in federal custody—compared to 130 in 1996—and hundreds of thousands of minors have been apprehended either alone or with families at the southern border so far this year—compared to the 8,500 identified by the Supreme Court as a “problem.” The significant year-to-year increases in the last decade are unprecedented and cannot be overstated.

For family units, the overall number of people in family units has increased by more than 25 times what they were in 2013—from FY 14,855 to more than 400,000 through June 2019.

Figure 1: Family Unit Apprehensions and Inadmissibles at the Southwest Border by Fiscal Year



* Partial year data for FY 2019; through June.

84 Fed. Reg. at 44,404.

In FY 2019 so far, from October 2018 through July 2019, the total number of UAC apprehensions along the Southwest border was 69,157, and the total number of family unit apprehensions was 432,838. An additional 3,838 UACs and 41,949 family units have been found inadmissible at ports of entry. *See* U.S. Customs and Border Protection, Southwest Border Migration FY2019, available at: <https://www.cbp.gov/newsroom/stats/sw-border-migration>. The dramatic increase in minors crossing the Southwest border in and of itself is a circumstance

1 necessitating termination of the Agreement because it was unforeseen by the parties
2 and unaddressed in the Agreement—which instead had an influx provision that came
3 into effect if *just 130 children* were in INS custody. Accordingly, the federal
4 government has now published regulations that provide a comprehensive approach
5 to deal with the crisis that exists *today*, under the framework of *current* statutory
6 provisions.

7 c. The Agreement Should Terminate Because of Changes in Law
8 Since 1997.

9 The law governing immigration and alien minors has changed significantly
10 since the Agreement was entered, further warranting termination. Congress has
11 made major and important changes that restructure the government’s responsibility
12 for the care and custody of minors not accompanied by a parent or legal guardian.
13 The HSA and TVPRA, like the *Flores* litigation that gave rise to the Agreement, are
14 designed to create special protections for the most vulnerable minors—those who
15 enter the United States unaccompanied by a parent or legal guardian. These changes
16 show that the treatment of accompanied minors was left to be governed by existing
17 law and implementing regulations, by standards that take into account the framework
18 applicable to their adult parents with whom they are traveling.

19 In 2002, Congress enacted the HSA. Pub. L. No. 107-296, 116 Stat. 2135.
20 The HSA created DHS, transferring most immigration functions formerly performed
21 by INS to the newly formed DHS and its components, including CBP and ICE. *See*
22 *also* DHS Reorganization Plan Modification of January 30, 2003, H.R. Doc. No.
23 108-32 (2003) (set forth as note to 6 U.S.C. § 542).

24 The HSA also transferred to HHS the responsibility for the care of
25 “unaccompanied alien children” (UACs) “who are in Federal custody by reason of
26 their immigration status.” HSA § 462(a), (b)(1)(A); (codified at 6 U.S.C. § 279(a),
27 (b)(1)(A)). The HSA further transferred to HHS the responsibility for making all
28 placement decisions for UACs, required HHS to coordinate these placement

1 decisions with DHS, and prohibited HHS from releasing UACs on their own
2 recognizance. *See id.* § 279(b)(1)(C), (D), (b)(2).

3 The TVPRA, signed into law on December 23, 2008, provided further
4 protections to UACs in government custody. Indeed, the TVPRA itself should have
5 terminated the Agreement in 2008: the material portions of the Agreement
6 addressing UACs were codified with the enactment of section 235 of the TVPRA,
7 Pub. L. No. 110-457, § 235, 122 Stat. 5044, 5074–5082 (Dec. 23, 2008) (codified in
8 principal part at 8 U.S.C. § 1232). *See, e.g.*, Carla L. Reyes, “Gender, Law, and
9 Detention Policy: Unexpected Effects on the Most Vulnerable Immigrants,” 25 Wis.
10 J.L. Gender & Soc’y 301, 309–10 (Fall 2010) (“The Flores Settlement Agreement
11 serves as the primary foundation for UAC detention policy, and the [TVPRA]
12 recently codified many of its provisions.”).

13 The TVPRA provides that “the care and custody of all unaccompanied alien
14 children, including responsibility for their detention, where appropriate, shall be the
15 responsibility of the Secretary of Health and Human Services.” 8 U.S.C.
16 § 1232(b)(1). It then details that care and custody under terms largely derived from
17 the Agreement. Plaintiffs, of course, have not argued that the Flores Settlement
18 Agreement overrides this statute that comprehensively addresses the care and
19 custody of UACs.

20 In addition to these statutory changes, the issuance of the new rules here
21 themselves constitute a change in the law calling for termination of the Agreement
22 because the regulations comprehensively address the entire subject matter of the
23 Agreement. That is especially so because the Agreement expressly provides that it
24 will terminate upon the issuance of regulations implementing its provisions.

25 -----

26 The government recognizes that as recently as last year, this Court found that
27 the prominent changes in statutory law and landscape of immigration as of a year
28 ago were not significant enough, on their own, to warrant termination or amendment

1 of the Agreement, ECF Nos. 177, 455. We submit that conclusion was erroneous,
2 and the numbers of children crossing the Southwest border continue to rise at an
3 extraordinary pace in part due to court decisions that create a powerful incentive to
4 travel with children and pursue asylum claims that are likely to fail, an issue of
5 growing concern across the country that was recognized in the Rule. 84 Fed. Reg.
6 44485. This fiscal year the numbers of children and family units have jumped 400%
7 over all of 2018, and three months remain in the year. *See* 84 Fed. Reg. at 44,496;
8 U.S. Customs and Border Protection, Southwest Border Migration FY2019,
9 <https://www.cbp.gov/newsroom/stats/sw-border-migration>. The numbers are over
10 25 times those just back in 2013. *Id.* And together with this surge is the reality that
11 most asylum claims are not meritorious—with only 17% of aliens with cases
12 completed in 2018 who established a credible fear being granted asylum. 83 Fed.
13 Reg. 55,935. And, in any event, the comprehensive regulations issued by the two
14 Departments, when coupled with the changes in statutory law and immigration
15 landscape, now require termination of the Agreement.

16 In sum, the Court should thus dissolve the Agreement because it is the very
17 type of institutional decree that the Supreme Court cautioned against: it implicates
18 the separation of powers and prevents the government from exercising its
19 constitutional powers to develop new policies to address the changes in immigration
20 to the United States. The Agreement, on its face, was intended to implement a
21 nationwide policy and be temporary in nature. Refusing to terminate the Agreement
22 would “insulate the policies embedded in the order . . . from challenge and
23 amendment” merely because it was initially written as a litigation settlement rather
24 than a regulation and despite the acknowledgment in the Agreement that it could be
25 replaced through the regulatory process. *See Horne*, 557 U.S. at 453. The power to
26 enforce the immigration laws—including those involving child migrants—rests in
27 the Executive branch and its agencies; the Agreement, however, prevents the
28 Executive from exercising its authority over the treatment of alien children.

1 *Mathews*, 426 U.S. at 81. The Agreement essentially removes from the Executive
2 the power to respond to new immigration challenges and places that power in the
3 hands of the Judiciary, contrary to bedrock separation of powers principles. Because
4 the current statutory and regulatory landscape fully provides for the constitutional
5 and statutory rights of alien minors—the purpose for which this litigation was
6 originally instituted and for which the Agreement was put in place—it is time for the
7 Court to end its superintendence of this aspect of immigration policy and to return
8 responsibility for determining and executing that policy to the Executive branch.

9 **D. The Public Interest Militates Termination Given Flaws in the**
10 **Certified Class**

11 **1. The Certified Class is Unwieldy And Not Cognizable Under**
12 **Current Standards.**

13 The *Flores* class no longer satisfies Rule 23(a) because there are not common
14 questions of law and facts that govern the custody of minors, and the class is far too
15 large and unwieldy for class action treatment. “A district court may decertify a class
16 at any time.” *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 966 (9th Cir.
17 2009)). The standard for class decertification is the same as the standard for class
18 certification: Plaintiffs may maintain the case as a class action only if they satisfy
19 the requirements of Rule 23. *See, e.g., Marlo v. UPS, Inc.*, 639 F.3d 942, 947 (9th
20 Cir. 2011). While we are not yet formally moving to decertify the class, fundamental
21 flaws in the class require terminating the agreement in the public interest.

22 The class certified under the Agreement is defined as “[a]ll minors who are
23 detained in the legal custody of the INS.” Agreement ¶ 10. Putting to one side the
24 government’s position that the Agreement was never meant to apply to minors
25 accompanied by their parents, the multitude of questions that are raised by the many
26 circumstances under which alien minors can come into the custody of either of two
27 government agencies is not suitable to class action treatment, as the case no longer
28 presents “questions of fact or law that are common to the class.” Fed. R. Civ. P.
23(a)(2).

1 Most importantly, the due process protections that apply in these
2 circumstances vary in many ways—whether the minor is apprehended at the border
3 or upon illegally crossing the border, or in the interior; whether the minor is alone
4 or with a parent; whether a parent or legal guardian is available in the United States;
5 the age of the minor; the purpose served by various facilities where custody might
6 take place for shorter or longer periods of time. In short, there is no common
7 question presented by this amorphous set of circumstances that is susceptible to a
8 common answer. *Wal-Mart Stores, Inc., v. Dukes, et al.*, 564 U.S. 338, 349 (2011).

9 The statutory and regulatory treatment of each of these circumstances also
10 varies dramatically. In 1997, when the Agreement was signed between Plaintiffs
11 and the now-abolished INS, the INS was responsible for arresting, processing,
12 detaining or releasing, and removing aliens, including the small number of minors
13 both accompanied and unaccompanied. Now two agencies—including multiple
14 components of DHS—are responsible for the care and custody of hundreds of
15 thousands of minors at different stages of the immigration process and under widely
16 varying legal requirements and standards. Moreover, the original *Flores* litigation
17 solely challenged the detention of minors under what was, at the time, a discretionary
18 detention statute implemented on an ad hoc basis without national standards. *See*
19 *Reno*, 507 U.S. at 309 (“Respondents contend that the regulation goes beyond the
20 scope of the Attorney General’s discretion to continue custody over arrested aliens
21 under 8 U. S. C. § 1252(a)(1)”). Now, in 2019, *multiple* agencies have custody of
22 alien minors at different times, and which agencies a minor will encounter, as well
23 as which statutes govern their custody, depends on their legal status as accompanied
24 or unaccompanied minors and whether they are apprehended at the border or in the
25 interior. *See Flores*, 862 F.3d at 874 (“There is no question that the HSA and
26 TVPRA gave new responsibilities to ORR with respect to the care and custody of
27 unaccompanied minors.”).

1 Today, for instance, unaccompanied class members are not placed in the
2 immigration detention facilities of DHS—INS’s successor—but transferred into the
3 custody of ORR, and then released to suitable custodians after ORR that ensures
4 each custodian can care for the child and would not place him or her at risk. 8 U.S.C.
5 § 1232(b)(3); *see* 6 U.S.C. § 279(a), (b)(1)(A), (g)(2). Where no suitable custodian
6 is available, UACs may remain in ORR custody in a setting appropriate for their
7 care. Further complicating the matter, ORR custody can include foster care
8 facilities, group homes, residential treatment facilities, or, when the individual is
9 determined by ORR to be a danger to self or community, non-punitive secure
10 custody. *See* 8 U.S.C. § 1232(c)(2)(A). Minors accompanied by their parents, on
11 the other hand, are subject to custody by DHS custody and their custody raises a
12 range of issues relating to family unification and the need to enforce immigration
13 statutes as to the parents. Given the diversity of agencies now involved in the
14 detention of minors, and the variety of laws and factual scenarios that animate
15 detention decisions, there is no longer a “Flores class” recognizable pursuant to Rule
16 23(a).

17 Indeed, as litigation under the Agreement has shown, this Court is managing
18 the detention of aliens in a manner more akin to management by a federal agency,
19 not efficiently resolving the issues raised by the class “in one stroke” or satisfying
20 the “capacity of a classwide proceeding to generate common answers apt to drive
21 the resolution of the litigation.” *Wal-Mart*, 564 U.S. at 350 (citation and quotation
22 removed); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 (9th Cir. 2011) (must
23 be a “common pattern or practice that could affect the class as a whole”).

24 **2. Other Flaws in the Class Further Justify Terminating the** 25 **Agreement in the Public Interest**

26 Flaws in the class certification process and the oversight of major portions of
27 the immigration system by class counsel further militate in favor of terminating the
28 Agreement in the public interest. To begin, the class certification process was

1 problematic in this case. A settlement class of “all minors” was certified here after
2 minimal notice, no fairness hearing, and no special procedures to account for the fact
3 this case involved a class of children without their parents, and children are not
4 authorized to litigate in the federal courts without consent of a guardian. *See* Fed.
5 R. Civ. P. 17(c)(2). No parents or guardians were involved in the certification
6 process or provided notice of the certification. *Id.* Yet the Agreement created and
7 continues to create significant tension with parental rights, particularly with respect
8 to children accompanied by their parents or legal guardians. The absence of parents
9 and legal guardians from this litigation has led to further litigation and is an
10 additional reason why the Agreement should be terminated.

11 It is also not in the public interest to allow class counsel to implement through
12 litigation a “nationwide policy for the detention, release, and treatment of minors in
13 the custody of the INS.” Agreement ¶ 9. There is no congressional enactment
14 evincing the will of the people to imbue Plaintiffs’ counsel with the government’s
15 constitutional role concerning immigration policy. “For reasons long recognized as
16 valid, the responsibility for regulating the relationship between the United States and
17 our alien visitors has been committed to the political branches of the Federal
18 Government.” *Mathews v. Diaz*, 426 U.S. 67, 81 (1976); *see Reno*, 507 U.S. at 305.
19 And yet, under the Agreement, for two decades a single set of lawyers has effectively
20 implemented through litigation a large part of the immigration system involving
21 multiple agencies, hundreds of thousands of class members, implicating vast public
22 resources, and affecting hundreds of facilities—indefinitely. This extraordinary
23 deferral of policy judgments to private actors has resulted in significant conflicts
24 among class counsel at the expense of the interests of the massive, amorphous, and
25 ever-changing class they represent. Lead counsel has also been the subject of
26 significant questions about his competency with respect to the care of children—
27 including the operation of a substandard facility for minor children, and other issues
28 that give rise to conflicts of interest with his role as class counsel overseeing the

1 conditions children face in government facilities. *See* [https://www.latimes.com/](https://www.latimes.com/projects/la-me-immigrant-children-group-home-casa-libre-peter-schey/)
2 [projects/la-me-immigrant-children-group-home-casa-libre-peter-schey/](https://www.latimes.com/projects/la-me-immigrant-children-group-home-casa-libre-peter-schey/) (published
3 May 22, 2019); [https://www.latimes.com/local/lanow/la-me-casa-libre-enforcement](https://www.latimes.com/local/lanow/la-me-casa-libre-enforcement-20190624-story.html)
4 [-20190624-story.html](https://www.latimes.com/local/lanow/la-me-casa-libre-enforcement-20190624-story.html) (published June 24, 2019) (noting that licensing officials held
5 a non-compliance conference concerning a pattern of violations and directed class
6 counsel to provide “a detailed ‘plan of correction,’ which must be submitted to
7 licensing staff by July 19”). For example, positions class counsel takes in defending
8 the conduct at the facility he operates, *id.*, could conflict with the interests of minors
9 he represents as class counsel. And there are inherent conflicts between class
10 counsel operating a licensed child migrant shelter while simultaneously
11 administering an agreement that provides for the release of minors to “a licensed
12 program willing to accept legal custody.” Agreement ¶ 14.E; Mot. to Enforce at 7
13 (arguing that regulations are insufficient because they do not authorize release of
14 children to “a licensed juvenile shelter”); *see Flores*, 507 U.S. at 302 (Plaintiffs
15 arguing in favor of requiring the government to release minors to “willing-and-able
16 private custodian[s]”). Under these circumstances, it is not in the public interest to
17 continue the Agreement, and instead the new rules should be evaluated on a
18 standalone basis in an appropriate case filed by an appropriate plaintiff subject to the
19 rules.

20 **IV. CONCLUSION**

21 The issuance of the rule terminates the Agreement. The regulations
22 substantively parallel the Agreement while exercising policy judgments developed
23 over time that reflect a “reasonable response” to the difficult problems presented
24 when the government encounters immigrant minors. *Reno*, 507 U.S. at 315. If the
25 Court grants the motion to enforce, the government respectfully requests further
26 briefing on remedies. Alternatively, the Court should vacate the Agreement in light
27 of the significant changes in law and circumstances since 1997.
28

1 Dated: August 30, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2019, I served the foregoing pleading on
all counsel of record by means of the District Clerk's CM/ECF electronic filing
system.

/s/ August E. Flentje

AUGUST E. FLENTJE

U.S. Department of Justice

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